SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 532

C. D. CALBECK, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, UNITED STATES DEPARTMENT OF LABOR, ET AL.,

PETITIONERS,

vs.

THE TRAVELERS INSURANCE COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

	Original	Print
Record from the United States District Court for the Western District of Louisiana in the case of Calbeck v. The Travelers Insurance Company, et al.		
Complaint	1	1
Exhibit "A"—Compensation order-supplemental findings of fact	13	10
Exhibit "B"—Compensation order-rejection of claim	19	14
Exhibit "C"—Compensation order-modification of award	23	18
Answer of McGuyer, et al.	26	21
Motion to dismiss by Caldeck	30	23
Motion to dismiss by McGuyer, et al.	30	24
Excerpts from official report of proceedings before the Deputy Commissioner	32	25
Opinion, Hunter, J.	57	38
Order granting summary judgment and dismissal of complaint	61	41
Notice of appeal	62	41
Clerk's certificate (omitted in printing)	75	42
Proceedings in the United States Court of Appeals for the Fifth Circuit		

	Original	Print
Argument and submission	76	42
Opinion, Brown, J.	77	43
Judgment	94	56
Clerk's certificate (omitted in printing)	97	56
Record from the United States District Court for the Eastern District of Louisiana in case of Donovan v. Avondale Marine Ways, Inc.		
Complaint to enjoin compensation order under Longshoremen's and Harbor Workers' Compensation Act	2	56
Answer of Minus Aizen	6	60
Motion of defendant, Minus Aizen, for a summary judgment	10	62
Plaintiff's motion for summary judgment under Rule 56	11	63
Proceedings before the Deputy Commissioner of the Seventh Compensation District of the U. S. Department of Labor, Bureau of Employees' Compensation—Case No. 434-328	12	64
Claimant's Exhibit #1—Employees's claim for compensation	31	75
Respondent's Exhibit "A"—Answer of employer or insurance carrier to employee's claim for compensation	34	78
Respondent's Exhibit "B"—Letter dated November 29, 1958 from Avondale Marine Ways, Inc., to Bureau of Employees Compensation	36	80
Respondent's Exhibit "C"—Employer's first report to Deputy Commissioner of accident or occupation disease	37	81
Respondent's Exhibit "D"—Job status report	39	84
Deputy Commissioner's Exhibit #1—Letter dated November 17, 1958 to Avondale Marine Ways, Inc.	41	85
Deputy Commissioner's Exhibit #2—Stipulation of fact	42	86
Compensation award—Award of compensation	48	91
Minute entry of hearing on motion to dismiss and for summary judgment	54	95
Order granting motion to dismiss complaint and for summary judgment	55	95
Judgment	56	96
Notice of appeal	56	96
Clerk's certificate (omitted in printing)	60	97
Proceedings in the United States Court of Appeals for the Fifth Circuit:		
Argument and submission	61	97
Opinion, Brown, J.	62	98
Judgment	65	99
Clerk's certificate (omitted in printing)	69	100
Order extending time to file certiorari	70	100
Order allowing certiorari	71	101

1 (Filed endorsement omitted)

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

Civil Action No. 7873

THE TRAVELERS INSURANCE COMPANY, *et al.*,

v.

C. D. CALBECK, DEPUTY COMMISSIONER, *et al.*

Complaint

To the Honorable Judge of Said Court:

Now Comes The Travelers Insurance Company and Levingston Shipbuilding Company complaining of C. D. Calbeck, Deputy Commissioner, Isabell Scott McGuyer, Thomas Dalton McGuyer and Curtis Austin McGuyer, and for cause of action would respectfully show the Court the following:

1.

This complaint is filed by plaintiffs for the purpose of reviewing and setting aside as not in accordance with law an order for the payment of compensation made by the defendant Deputy Commissioner, C. D. Calbeck, for the Eighth Compensation District of the Bureau of Employees' Compensation, on the 13th day of May, 1960, purporting to be made by virtue of the authority conferred on said Deputy Commissioner by the provisions of the Long-
2 shoremen and Harbor Workers' Compensation Act, and further for a stay of payments and the preventing of the imposition of a penalty for failure to make the payments pursuant to said order. A copy of said Order attached hereto and marked Exhibit "A" is made a part of this complaint.

2.

This Court has jurisdiction of this complaint by virtue of the provisions of the Longshoremen and Harbor Workers' Compensation Act, Section 21(b), Act of March 4, 1927, 33 U.S.C., §921(b).

3.

The Travelers Insurance Company is a corporation incorporated under the laws of the State of Connecticut with a permit to do business in the State of Louisiana and Texas, and is the insurer of Levingston Shipbuilding Company, under the terms of the Longshoremen and Harbor Workers' Act at all times material hereto.

4.

Levingston Shipbuilding Company is a corporation incorporated under the laws of the State of Delaware with a permit to do business in the State of Louisiana and Texas, and at all times material hereto was the employer of Roger D. McGuyer.

5.

The defendant, C. D. Calbeck, Deputy Commis-
3 sioner, is the Deputy Commissioner for the Eighth Compensation District for the Bureau of Employees' Compensation, U. S. Department of Labor, and can be served at the Post Office Building, Galveston, Texas.

6.

The defendant, Isabell Scott McGuyer, claims to be the surviving wife of Roger D. McGuyer, and Thomas Dalton McGuyer and Curtis Austin McGuyer, claim to be surviving children of the employee, Roger D. McGuyer, and each of said defendants can be served with process at 1407 South Seventh Street, Temple, Texas.

7.

That on and before July 8, 1957, Roger D. McGuyer was employed by plaintiff, Levingston Shipbuilding Company, as a welder; that said employment contract was made within the State of Texas and on July 8, 1957, the said employee, Roger D. McGuyer, was temporarily working as a welder on the construction of a drilling barge, the hull of which was floating upon navigable waters, to-wit, the Sabine River, on the Louisiana side, at which time he sustained injuries resulting in his death on July 16, 1957; that

said drilling barge was being constructed by Levingston Shipbuilding Company, had never been used in navigation, had not been turned over to the owners, and was not completed until several months after the accident made the basis of this claim.

4

8.

That at the time of the accident above described, Levingston Shipbuilding Company had more than three employees and was engaged in a work covered by the Texas Workmen's Compensation Act and the said employee, Roger D. McGuyer, was covered by the Texas Workmen's Compensation Act, and the said employer, Levingston Shipbuilding Company, was a subscriber under the terms of said Act, and The Travelers Insurance Company was the insurance carrier under the Texas Workmen's Compensation Act.

9.

That at the time of said accident above described, Levingston Shipbuilding Company was insured by the plaintiff, The Travelers Insurance Company, under the terms and Provisions of the Longshoremen and Harbor Workers' Compensation Act.

10.

That after the death of the employee, Roger D. McGuyer, as above described and alleged, the defendant, Isabell Scott McGuyer, and the defendants, Thomas Dalton McGuyer, and Curtis Austin McGuyer, filed claim for Workmen's Compensation with the Industrial Accident Board of the State of Texas, claiming that they were the surviving wife and surviving children of the said Roger D. McGuyer and claiming the death benefits provided by said Act,

5 and thereafter, the said defendants, Isabell Scott McGuyer, Thomas Dalton McGuyer and Curtis Austin McGuyer, filed claim with the Deputy Commissioner under the Longshoremen and Harbor Workers' Compensation Act.

11.

That after formal hearing, Deputy Commissioner C. D. Calbeck, by Order dated and filed on February 18, 1959,

rejected the claim of said defendants, Isabell Scott McGuyer, Thomas Dalton McGuyer, and Curtis Austin McGuyer, on the grounds that said claim did not fall within the terms and provisions of the Longshoremen and Harbor Workers' Act because the said work was being done on an uncompleted vessel. Copy of said Order of February 18, 1959 and marked Exhibit "B" is attached hereto and made a part of this Complaint, and thereafter, by Order entered July 30, 1959, defendant, Deputy Commissioner C. D. Calbeck, modified said award by finding that the injury to Roger D. McGuyer occurred in an accident in Calcasieu Parish, Louisiana. A copy of said Award, marked Exhibit "C" is attached hereto and made a part hereof. That said awards denying the claims of defendants, Isabell Scott McGuyer, Thomas Dalton McGuyer, Curtis Austin McGuyer, dated February 18, 1959, and dated July 30, 1959, were made pursuant to claim made on the accident and death of Roger D. McGuyer as above alleged.

12.

That the Texas Workmen's Compensation Act, Articles 8306 et seq., Vernon's Annotated Civil Statutes, Revised 1925, as amended, validly and constitutionally provides compensation for the above described accident and death, being the one made the basis of the award of Deputy Commissioner C. D. Calbeck and sought to be set aside in this action, and that the same provides for death benefits for 360 weeks at $25.00 per week, provides that the same shall go to the surviving widow and the minor children, and the defendants, Isabell Scott McGuyer, Thomas Dalton McGuyer and Curtis Austin McGuyer, claim that they are the surviving widow and minor children of the deceased.

13.

That pursuant to the order of the defendant Deputy Commissioner, C. D. Calbeck, marked Exhibit "A" and dated May 13, 1960, plaintiff, The Travelers Insurance Company, has paid all amounts ordered to be paid to date of filing this Complaint, totalling the sum of $8,024.55; that under the terms and provisions of the Texas Work-

men's Compensation Act, the plaintiff, The Travelers Insurance Company, would owe by reason of the death of Roger D. McGuyer the sum of $9,000.00 plus interest at the rate of 4% on each weekly $25.00 payment due on and after July 16, 1957.

14.

That the Findings of Fact and Order of the Deputy Commissioner dated May 13, 1960 and being Exhibit "A" attached hereto are not in accordance with the law and facts and should be set aside; that said Order is not supported by facts and is contrary to the law as followers:

(1) that compensation for the accident and death of Roger D. McGuyer is validly and constitutionally covered and provided for by the Texas Workmen's Compensation Act;

(2) that the said Roger D. McGuyer at the time of the accident made the basis of the Order and claim was doing non-maritime work which was covered by the Texas Workmen's Compensation Act and, therefore, excluded by the terms and provisions of the Longshoremen and Harbor Workers' Act and particularly 33 U.S.C.A., §903(a), wherein compensation under the Act is provided only "if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law."

(3) that the Order of the defendant, Deputy Commissioner C. D. Calbeck, dated February 18, 1959, marked Exhibit "B" and attached hereto is a final order and res judicata of this claim;

(4) that there was no change in conditions or a mistake in a determination of fact at the time of the entry of the award of May 13, 1960, and thus no jurisdiction of the Commissioner for entering any such award.

(5) that there is no finding of fact in the Award of May 13, 1960 to the effect that there has been any change in conditions or a mistake in a determination of fact to support any jurisdiction for the award of May

13, 1960, and for the re-opening and reviewing and changing of the previous Award of February 18, 1959 rejecting the claim.

(6) there is no evidence in the record to sustain the findings of the Deputy Commissioner in the Award of May 13, 1960 that the injury and death comes under the terms and provisions of the Longshoremen and Harbor Workers' Compensation Act.

(7) there is no evidence in the record to sustain the Deputy Commissioner's award of compensation to the defendants, Isabell Scott McGuyer, Thomas Dalton McGuyer and Curtis Austin McGuyer.

(8) there is no evidence in the record that the use to which the uncompleted barge upon which the deceased Roger D. McGuyer was working at the time of his accident was capable of being put and the business for which it was intended related to the purposes of navigation, as found by the Deputy Commissioner.

(9) that there are no findings of any new facts by the Deputy Commissioner in the award of May 13, 1960 so as to justify the re-opening of said claim and of making said Award.

(10) that there is no provision in the Longshoremen and Harbor Workers' Compensation Act for the making of the award of May 13, 1960;

9 (11) the evidence in the record is undisputed to the effect that the accident occurred when the employee was engaged in welding on a barge under construction and which had never been in navigation and thus a non-maritime employment.

15.

The Claim for Compensation, the Answer of the plaintiffs and the duly transcribed notes of testimony taken at the hearing and the Awards of the Deputy Commissioner are all in the custody of the defendant C. D. Calbeck, and it is necessary for this Court to have possession of the papers and the records of said hearing and all other rele-

vant papers in the possession of the Deputy Commissioner in order to determine whether or not the award of May 13, 1960 was in accordance with the law.

16.

There is not in the record of the testimony in this case any evidence to support an award of compensation as entered by the Deputy Commissioner on May 13, 1960 and the plaintiffs herein will be irreparably damaged if an interlocutory injunction is not granted, and the payment of compensation under said Award stayed after payment has reached the maximum provided by the Texas Workmen's Compensation Act, pending the final hearing on this Complaint to reverse and set aside the Award of Compensation dated May 13, 1960. Plaintiff has paid the compensation ordered to be paid pursuant to said Award of May 13, 1960, as of the filing of this complaint, but if plaintiffs continue to pay all of said award, same will be far in excess of that provided by the Texas Workmen's Compensation Act, and if the Award of May 13, 1960 is set aside, the plaintiffs will not be able to recover said amounts, as there is no bond or other protection given by the defendant claimants to secure the return of any such over-payment if it should be held that this claim comes under the Texas Workmen's Compensation Act. Further, this plaintiff, The Travelers Insurance Company, cannot refuse to pay said claim without incurring a 20% penalty as provided by Section 914 of the Longshoremen and Harbor Workers' Act, subdivision (f) wherein it is stated:

> "If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof, which shall be paid at the same time as, but in addition to, such compensation, unless review of the compensation order making such award is had as provided in section 921 of this title and an interlocutory injunction staying payments is allowed by the court as provided therein." (33 U.S. C.A. 914)

The plaintiffs herein have no adequate remedy at law and have no means for the redress of the wrongs whereof they herein complain except through injunction proceedings mandatory or otherwise to set aside the award herein referred to.

11 WHEREFORE, plaintiffs pray:

(a) that a mandatory injunction be granted by and issued from this Court to Defendant C. D. Calbeck, Deputy Commissioner for the Eighth Compensation District, Bureau of Employees' Compensation, U. S. Department of Labor, commanding him to deliver to this Court or the Clerk thereof a certified transcript of the Claim for Compensation, the Answer thereto, the transcribed notes of testimony, and the Awards of February 18, 1959, July 30, 1959, and May 13, 1960, and all other papers or matters relevant to the hearings conducted by him in Case No. 659-23s (Fatal).

(b) that an interlocutory injunction be issued restraining the defendant C. D. Calbeck, Deputy Commissioner for the Eighth Compensation District, Bureau of Employees' Compensation, U. S. Department of Labor, from enforcing said award of compensation or imposing any penalty upon the plaintiffs for not paying the installments in accordance with said award after plaintiffs have paid an amount equal to that provided for by the Texas Workmen's Compensation Act.

(c) that a permanent injunction be granted by and issued from this Court to the defendant C. D. Calbeck, Deputy Commissioner for the Eighth Compensation District, Bureau of Employees' Compensation, U. S. Department of Labor, perpetually restraining said defendant from enforcing the aforesaid Award of Compensation;

12 (d) that a mandatory injunction be granted by and issued from this Court to said defendant, C. D. Calbeck, Deputy Commissioner for the Eighth Compensation District, Bureau of Employees' Compensation, U. S. Department of Labor, directing him to set aside the findings of fact and order of payment and that he be ordered

to make an order dismissing, rejecting, and dis-allowing said claim.

Plaintiffs pray for such other and further relief as they may be entitled to.

CAVANAUGH, HICKMAN, BRAME & HOLT
520 Weber Building
Lake Charles, Louisiana

s/ MEREDITH T. HOLT

LOUIS NELSON
349 McFadden Bldg.,
Beaumont, Texas

s/ LOUIS NELSON

Attorneys for Plaintiffs, Levingston Shipbuilding Company and The Travelers Insurance Company

13 **Exhibit "A" to Complaint**

UNITED STATES DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION
EIGHTH COMPENSATION DISTRICT

COMPENSATION ORDER SUPPLEMENTAL FINDINGS OF FACT

Case No. 659-238 (Fatal)

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act

MRS. ISABELL SCOTT McGUYER, Widow
THOMAS DALTON McGUIRE and
CURTIS AUSTIN McGUIRE, Minor Children of
ROGER D. McGUYER, Deceased Employee
Claimants

v.

LIVINGSTON SHIPBUILDING COMPANY
Employer

THE TRAVELERS INSURANCE COMPANY
Insurance Carrier

Compensation Orders having been filed herein on February 18, 1959, and July 30, 1959, and an action for judicial review of said Orders having been brought in the United States District Court for the Western District of Louisiana, Lake Charles Division, and said Court on the 20th day of April 1960, having issued an Order in said Action as follows:

"This case is remanded to the Deputy Commissioner in order to permit him to make findings and conclusions in accordance with the facts and the law."

14 Now pursuant to said Order the Deputy Commissioner makes the the following

Findings of Fact

On July 8, 1957, the employee above named was in the employ of the employer above named at Calcasieu Parish, Louisiana. The liability of the employer for compensation under the Longshoremen's and Harbor Workers' Com-

pensation Act was insured by The Travelers Insurance Company.

On the said day the employee, while performing service as a welder for the employer aboard a drilling barge, Job No. 554, at the employer's shipyard, said vessel then being afloat upon the navigable waters of the United States, sustained personal injury from which he died on July 16, 1957. The employee was welding on the port side of the deck when an accumulation of gases exploded in a tank about 40 feet away, throwing a skip bucket through the air and striking the employee. He sustained severe head injuries, fracture of both arms, both legs and lacerations of the right foot. The employee died from cerebral concussion that resulted from said injury. The injury and death arose out of and in the course of his employment.

The Drilling Barge on which the employee was working was launched and afloat upon navigable waters at the time of the accident. The use to which the vessel was capable of being put and the business for which it was intended related to the purposes of navigation. The employee was at work upon a structure designated for maritime uses. He was engaged at work upon navigable waters in the completion of a new vessel launched but not quite finished or placed in navigation. The employer had other employees who were engaged in maritime employment.

Written notice of injury and death was not given to the employer within thirty days, but the employer had knowledge of the injury and death of the employee and has not been prejudiced by the lack of such written notice. The employer furnished the employee with medical treatment, etc., in accordance with the provisions of Section 7(a) of the said Act. The average weekly wage of the employee at the time of injury was $81.00. He was not paid full wages for day of injury.

As a result of the injury the employee was wholly disabled from July 8, 1957, to July 15, 1957, inclusive, less the three day waiting period prescribed by law, for which he was entitled to compensation for temporary total disability for 5/7ths week at $54.00 per week, $38.57.

Mrs. Isabell Scott McGuyer, who was born on July 25, 1923, and married to the employee on January 2, 1948, is the surviving wife of the employee. She was living with

and dependent upon the employee for support at the time of his injury and death. She is therefore entitled
16 to death benefits at $28.35 per week (35 per cent of $81.00) beginning July 16, 1957, and continuing subject to the limitations of the said Act, during widowhood, with two years' compensation in one sum upon remarriage.

Thomas Dalton McGuyer, who was born on November 10, 1955, and Curtis Austin McGuyer, who was born on June 2, 1957, are the surviving minor children of the employee. Each of said minor children is entitled to death benefits at $12.15 per week (15 per cent of $81.00), beginning July 16, 1957, and continuing thereafter until he shall have attained 18 years of age, subject to the limitations of the Act. The death benefits in behalf of said minor children shall be payable to their mother and natural guardian, Mrs. Isabell Scott McGuyer.

Accrued compensation for temporary total disability, death benefits and funeral expenses to include May 9, 1960, amounts to $7,778.12. The funeral expenses on behalf of the employee were rendered by Claybar Funeral Home, Pine Street, Orange, Texas, at a cost of $986.50, which was paid by Mrs. Isabell Scott McGuyer. The employer and the insurance carrier are liable for $400.00 as reasonable funeral expenses. The employer and the insurance carrier have paid $153.57 as disability and or death benefits under the Texas Workmen's Compensation Act, for which they are entitled to take credit.

Upon the foregoing findings of fact the Deputy
17 Commissioner makes the following

Award

The employer, the Levingston Shipbuilding Company, and the insurance carrier, The Travelers Insurance Company, shall pay compensation and death benefits to Mrs. Isabell Scott McGuyer in her own behalf and in behalf of Thomas Dalton McGuyer and Curtis Austin McGuyer as follows: Death benefits from July 16, 1957, to May 9, 1960, inclusive, 147 weeks at the combined rate of $52.65 per week, $7,739.55. Subsequent to May 9, 1960, they shall continue the payment of death benefits to Mrs. Isabell Scott McGuyer in her own behalf and in behalf of said

minor children at the combined rate of $52.65 per week, payable in biweekly installments, subject to the limitations of the Act or until further order of the Deputy Commissioner.

The employer and the insurance carrier shall also pay to Mrs. Isabell Scott McGuyer compensation due the employee for temporary total disability from July 8, 1957, to July 15, 1957, inclusive, less the three day waiting period prescribed by law, 5 7ths week at $54.00 per week, $38.57.

The employer and the insurance carrier having paid $153.57 as disability and or death benefits, shall pay forthwith $7,624.55.

The employer and the insurance carrier shall also pay $400.00 to Mrs. Isabell Scott McGuyer as reasonable
18 funeral expenses.

An attorney's fee of $1,700.00 is approved in favor of Mandell & Wright, Attorneys, for services rendered and expenses incurred on behalf of the claimant, such sum to be a lien upon and be paid out of this award.

Given under my hand at Galveston, Texas this 13th day of May, 1960.

C. D. CALBECK
Deputy Commissioner Eighth Compensation District.

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Compensation Order was sent to the claimant, the employer, and the insurance carrier at the last known address of each as follows:

By Registered Mail:

Mrs. Isabell Scott McGuyer
1407 So. 7th Street, Temple, Texas

Levingston Shipbuilding Company
P. O. Box 411, Orange, Texas

The Travelers Insurance Company
Payne Building, Port Arthur, Texas

By Regular Mail:

Strong, Moore, Pipkin, Strong & Nelson
P. O. Box 1632, Beaumont, Texas

Mandall & Wright
South Coast Building, Houston 2, Texas

Bureau of Employees' Compensation
U. S. Dept. of Labor, Washington 25, D. C.

Mailed: May 13, 1960

C. D. Calbeck
Deputy Commissioner

19 **Exhibit "B" to Complaint**

UNITED STATES DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION
EIGHTH COMPENSATION DISTRICT

COMPENSATION ORDER

REJECTION OF CLAIM

Case No. 659 238 (Fatal)

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act

MRS. ISABELL SCOTT McGUYER, Widow, and
THOMAS DALTON McGUIRE and
CURTIS AUSTIN McGUIRE, Minor Children of
ROGER D. McGUYER, Deceased Employee
Claimants

v.

LIVINGSTON SHIPBUILDING COMPANY
Employer

THE TRAVELERS INSURANCE COMPANY
Insurance Carrier

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following

Findings of Fact

On July 8, 1957, the employee above named was in the employ of the employer above named, whose address is P. O. Box 411, Orange, Texas, in the Eighth Compensation District. The employer was subject to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, entitled "An Act to provide compensation for
20 disability or death resulting from injury to employees in certain maritime employments, and for other purposes." The liability of the employer for compensation under the said Act was insured by The Travelers Insurance Company.

On the said day the employee herein, while performing service as a welder for the employer aboard a Drilling Barge, Job No. 554, at the employer's shipyard at Orange, Texas said vessel then being afloat upon the navigable waters of the United States, sustained personal injury from which he died on July 16, 1957. The employee was welding on port side of deck when an accumulation of gases exploded in tank about 40 feet away, throwing a skip bucket through the air and striking the employee. As a consequence thereof the employee sustained severe head injuries, fracture of both arms, both legs and lacerations of the right foot. The employee died from cerebral concussion that resulted from contusion of head on July 8, 1957. The employee's injury and death arose out of and in the course of his employment.

Written notice of injury and death was not given to the employer within thirty days, but the employer had knowledge of the injury and death of the employee and has not been prejudiced by the lack of such written notice. The average weekly wage of the employee herein at the time of the injury was $81.00.

Isabell Scott McGuyer, who was born on July 25,
21 1923, and married to the employee on January 2, 1948, is the surviving wife of the employee. She was living with and dependent upon the employee for support at the time of his injury.

Thomas Austin McGuyer, who was born on November 10, 1955, is a surviving son of the employee.

Curtis Austin McGuyer, who was born on June 2, 1957, is a surviving son of the employee.

Funeral services were rendered in behalf of the employee by Claybar Funeral Home, Pine Street, Orange, Texas, at a cost of $986.50.

The Drilling Barge was launched and afloat upon navigable waters. At the time of the accident the said barge was on navigable waters. The use to which the vessel was capable of being put and the business for which it was intended related to purposes of navigation. The employee was at work upon a structure designated for maritime uses. He was engaged upon navigable waters in the completion of a new ship launched but not quite finished or placed in navigation. The employer had other employee, some of whom were engaged in maritime employment.

Upon the foregoing findings of fact, the Deputy Commissioner Orders that the claim for death benefits filed by Mrs. Isabell Scott McGuyer in her own behalf and in behalf of Thomas Austin McGuyer and Curtis Austin McGuyer, minor sons of the employee, be and they are hereby REJECTED for the following reason:

22 It has not been held that the work on an uncompleted vessel comes within the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

Given under my hand at Galveston Texas this 18th day of February.

C. D. CALBECK
Deputy Commissioner
Eighth Compensation District

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Compensation Order was sent to the claimant, the employer, and the insurance carrier at the last known address of each as follows:

By Registered Mail:

Mrs. Isabell Scott McGuyer
1407 So. 7th St., Temple, Texas

Levingston Shipbuilding Company
P.O. Box 411, Orange, Texas

The Travelers Insurance Company
Payne Building, Port Arthur, Texas

By Regular Mail:

Strong, Moore, Pipkin, Strong & Nelson
P.O. Box 1632, Beaumont, Texas

Mandell & Wright
South Coast Bldg., Houston, Texas

Bureau of Employees' Compensation
U. S. Dept. of Labor, Washington 25, D. C.

Mailed: **February 18, 1959.**

C. D. CALBECK
Deputy Commissioner

Exhibit "C" to Complaint

UNITED STATES DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION
EIGHTH COMPENSATION DISTRICT

COMPENSATION ORDER

MODIFICATION OF AWARD

Case No. 659-238 (Fatal)

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act

MRS. ISABELL SCOTT McGUYER, Widow, and
THOMAS DALTON McGUYER and
CURTIS AUSTIN McGUYER, Minor Children of
ROGER D. McGUYER, Deceased Employee
Claimants

v.

LEVINGSTON SHIPBUILDING COMPANY
Employer

THE TRAVELERS INSURANCE COMPANY
Insurance Carrier

On February 18, 1959, a Compensation Order, Rejection of Claim, was filed in the above entitled case. In the said Compensation Order the claimant's claim for compensation was rejected for the reason it has not been held that the work on an uncompleted vessel comes within the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and it was found that the accident occurred at the employer's shipyard at Orang, Texas. The claimant thereafter instituted proceedings for judicial review and the case was the subject of consideration by the United States
24 District Court for the Eastern District of Texas. Subsequently a motion was filed in behalf of the Government to dismiss cause No. 4143 for lack of jurisdiction. The said Court refrained from a dismissal and entered an order on May 26, 1959, directed to the defendant Deputy Commissioner as follows:

"It Is, Therefore, Ordered, Adjudged and Decreed that the Order of the Defendant-Deputy Commissioner, C. D. Calbeck, which is made the basis of this suit, be, and the same is hereby remanded to him to reconsider the question of the situs of injury to be in Orange, Texas."

Compensation Order filed February 18, 1959, is made a part hereof by reference.

The parties have submitted Stipulation of Facts, including the following: * * * the accidental injury made the basis of this suit occurred within the boundaries of Calcasieu Parish, Louisiana.

No further hearing have been applied for by any interested party, the Deputy Commissioner, pursuant to the directions of the Order of the Court, hereby amends and corrects said Compensation Order by deleting the words "Orange, Texas," from the third line from the bottom of page one thereof and thereby causing said line to read as follows: * * * "employer's shipyard at Calcasieu Parish, Louisiana, said vessel then being afloat . . ."

It Is Further Ordered that the decision as re-
25 produced shall contain the foregoing correction and amendment.

Given under my hand at Galveston Texas this 30th day of July, 1959.

C. D. Galbeck
Deputy Commissioner
Eighth Compensation District

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Compensation Order was sent to the claimant, the employer and the insurance carrier at the last known address of each as follows:

By Registered Mail:

Mrs. Isabell Scott McGuyer
1407 So. 7th Street, Temple, Texas

Levinston Shipbuilding Company
P. O. Box 411, Orange, Texas

The Travelers Insurance Company
Payne Building, Port Arthur, Texas

By Regular Mail:

Strong, Moore, Pipkin, Strong & Nelson
P. O. Box 1632, Beaumont, Texas

Mandell & Wright, Attorneys
South Coast Building, Houston, Texas

Bureau of Employees' Compensation
U. S. Department of Labor, Washington 25, D. C.

C. D. CALBECK
Deputy Commissioner

Mailed: July 30, 1959.

Complaint, with attachments Exhibits "A", "B" and "C" Filed May 31, 1960

Alton L. Curtis, *Clerk*

26 IN THE UNITED STATES DISTRICT COURT

Answer of McGuyer, et al.—Filed June 16, 1960

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME ISABELL SCOTT MCGUYER, THOMAS DALTON MCGUYER, and CURTIS AUSTIN MCGUYER, Defendants in the above styled and numbered cause, and for their answer would respectfully show the Court as follows:

1.

These Defendants admit that the purpose of the plaintiffs is as set forth in Paragraph 1 of their complaint.

2.

These Defendants admit the allegations in Paragraph 2 of the plaintiffs' complaint.

3.

These Defendants admit the allegations in Paragraph 3 of the plaintiffs' complaint.

4.

These Defendants admit the allegations in Paragraph 4 of the plaintiffs' complaint, except that these defendants do not know what permits, if any, the plaintiff may have.

5.

These Defendants admit the allegations in Paragraph 5 of the plaintiffs' complaint.

6.

These Defendants not only "claim" they are the
27 surviving wife and children of the deceased, Roger D. McGuyer, they affirmatively allege that they are such.

7.

These Defendants deny the allegations contained in Paragraph 7 of the plaintiffs' complaint except in so far as such allegations are supported by the Deputy Commissioner's award dated May 13, 1960.

8.

These Defendants deny the allegations contained in Paragraph 8 of the plaintiffs' complaint except in so far

as such allegations are supported by the evidence offered and received in the formal hearing had before the Deputy Commissioner and the Deputy Commissioner's award dated May 13, 1960.

9.

These Defendants admit the allegations in Paragraph 9 of the plaintiffs' complaint.

10.

These Defendants deny the allegations in Paragraph 10 of the plaintiffs' complaint except in so far as such allegations are supported by the evidence offered and received in the formal hearing had before the Deputy Commissioner.

11.

These Defendants admit the allegations in Paragraph 11 of the plaintiffs' complaint.

12.

These Defendants deny the allegations contained in Paragraph 12 of the plaintiffs' complaint.

13.

These Defendants deny the allegations contained in Paragraph 13 of the plaintiffs' complaint, except that they do admit that approximately the sum of $8,024.55 has been paid to them by The Travelers Insurance Company.

14.

These Defendants deny the allegations contained in Paragraph 14 of the plaintiffs' complaint.

15.

These Defendants admit the allegations contained in Paragraph 15 of the plaintiffs' complaint.

16.

These Defendants deny the allegations contained in Paragraph 16 of the plaintiffs' complaint.

17.

These Defendants say that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 17 of the plaintiffs' complaint.

18.

These Defendants deny that the plaintiffs are entitled to the relief prayed for.

29 WHEREFORE, PREMISES CONSIDERED, these defendants pray that the order of the Deputy Commissioner be affirmed, that the plaintiffs take nothing by their suit, and that these defendants go hence without day [sic] with their costs, and for such other and further relief to which they may show themselves justly entitled to receive.

MANDELL & WRIGHT

By s/ HERMAN WRIGHT
707 South Coast Building
Houston 2, Texas

JOSEPH E. BASS, JR.
s/ J. E. BASS, JR.
506 Weber Building
Lake Charles, Louisiana

Attorneys for Defendants, Isabell Scott McGuire, Thomas Dalton McGuire and Curtis Austin McGuire

Filed June 16, 1960
Alton L. Curtis, *Clerk*

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30 IN THE UNITED STATES DISTRICT COURT

Motion to Dismiss by Calbeck—Filed July 21, 1960

The Defendant, C. A. Calbeck, Deputy Commissioner, appearing herein through T. Fitzhugh Wilson, United States Attorney, Western District of Louisiana, moves the Court as follows:

To dismiss this action because the complaint fails to state a claim against defendant upon which relief can be granted.

s/ T. Fitzhugh Wilson
T. FITZHUGH WILSON
United States Attorney

Filed July 21, 1960
Alton L. Curtis, Clerk

IN THE UNITED STATES DISTRICT COURT

Motion to Dismiss by McGuyer, et al.—Filed Aug. 24, 1960

COMES NOW ISABELL SCOTT MCGUYER, THOMAS DALTON MCGUYER, and CURTIS AUSTIN MCGUYER, Defendants in the above styled and numbered cause, and joins with
31 and adopts the motion to dismiss filed herein by the defendant, C. D. Calbeck, Deputy Commissioner. These defendants further adopt and join in the brief heretofore filed by the defendant, C. D. Calbeck, Deputy Commissioneir, and his supplementing letter dated August 11, 1960.

WHEREFORE, these defendants pray that the Court dismiss this action because the complaint fails to state a claim against any of the defendants upon which relief can be granted.

MANDELL & WRIGHT
By s/ Herman Wright
707 South Coast Building
Houston 2, Texas

JOSEPH E. BASS, JR.

s/ J. E. Bass, Jr.
506 Weber Building
Lake Charles, Louisiana

Attorneys for Defendants, Isabell Scott McGuyer, Thomas Dalton McGuyer and Curtis Austin McGuyer

Filed August 24, 1960
Alton L. Curtis, Clerk

32 U. S. DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act.

Case No. 659-38 (Fatal)

MRS. ISABELL McGUYER (Widow of Roger D. McGuyer, Deceased), *Claimant*

vs.

LEVINGSTON SHIPBUILDING COMPANY, *Employer*

THE TRAVELERS INSURANCE COMPANY, *Insurance Carrier*

Excerpts From Official Report of Proceedings, 13 June 1958

County Court House Building
Orange, Texas
Friday, 13 June 1958

Met, pursuant to notice, at 9:00 a.m.

BEFORE:

C. D. CALBECK, Deputy Commissioner of the Eighth Compensation District.

33 APPEARANCES:

FOR THE CLAIMANT:
HERMAN WRIGHT (Mandell & Wright)
South Coast Building, Houston, Texas

FOR THE EMPLOYER AND INSURANCE CARRIER:
LOUIS NELSON (Strong, Moore, Pipkin, Strong & Nelson)
McFaddin Building, Beaumont, Texas.

PROCEEDINGS

The Deputy Commissioner: I will make a statement for the record and when it is completed, the respective parties will state the issues with respect to which they wish to be heard and any objections, corrections, stipulations or additions may then be offered.

Claimant is present in person and is represented by Mr. Herman Wright of the law firm of Mandell & Wright, South Coast Building, Houston 2, Texas.

The employer and the insurance carrier are represented by Mr. Louis Nelson—not Jr. or something, is it?

Mr. Nelson: No, sir.

The Deputy Commissioner: Good. Thank you.

Of the law firm of Strong, Moore, Pipkin, Strong and Nelson, McFaddin Building, Beaumont, Texas.

This hearing is being held in room number 303 County Court House Building, Orange, Texas, beginning at
34 9:00 a.m., June 13, 1958.

It is in respect to a claim for compensation filed by Mrs. Isabell Scott McGuyer, widow of Roger D. McGuyer, for death of the employee on July 16th—that's not right, is it?

Mr. Nelson: 8th.

The Deputy Commissioner: July 16th?

Mr. Nelson: 8th.

Mr. Beeson: That's correct, that is the death.

The Deputy Commissioner: That is the date of death?

Mr. Beeson: That's right.

The Deputy Commissioner: Death of the employee on July 16, 1957, from injuries sustained by him on July 8, 1957 while performing service as a welder for Leyingston Shipbuilding Company aboard a drilling barge of Pacid /sic/ Oil Company, said vessel then being afloat upon the navigable waters of the United States.

On the said date the decedent was welding on port side of vessel when an accumulation of gases exploded in a tank about forty feet away, throwing a skip bucket through the air, striking the employee.

Mr. Wright, will you please state what claim you are making this morning unless Mr. Nelson wishes to narrow the issues and tell us what particular—
35 Mr. Nelson: The only issues the insurance carrier and employer have in mind is the question of jurisdiction under the Longshoremen's and Harbor Workers' Act and, of course, the question of who are the beneficiaries.

The Deputy Commissioner: Who are the beneficiaries. Yes.

Well, that is fine.

Well, with that understanding, Mr. Wright, what claim are you making this morning, merely for the death of the employee and that you wish to prove that it arose out of and in the course of employment, and that he does or is survived by certain dependents who are entitled to death benefits?

Mr. Wright: Yes, sir, wife and two children.

The Deputy Commissioner: How about funeral expenses, burial expenses?

Mr. Wright: Yes, sir, and funeral expenses.

The Deputy Commissioner: Well, then, are you ready to put on the widow?

Mr. Wright: Yes, sir, at any time.

* * * * * *

CECIL R. BEESON

was called as a witness for and in behalf of the
36 claimant, and being then and there duly sworn by the Deputy Commissioner, assumed the witness stand and, upon examination, testified as follows:

EXAMINATION BY THE DEPUTY COMMISSIONER

By the Deputy Commissioner:

Q. Your name is Mr. C. R. Beeson? A. Cecil R. Beeson.

Q. And your office or residence address, either one? A. Office address is Front and Mill Streets, Levingston Shipbuilding Company, Orange, Texas.

The Deputy Commissioner: Mr. Wright?

Direct Examination

By Mr. Wright:

Q. Mr. Beeson, I believe you are employed by the Levingston Shipbuilding Company? A. Yes, sir.

Q. And in what capacity are you employed there? A. I am Director of Industrial Relations, Personnel and Safety.

Q. I take it that you are acquainted with the operations of the plant and that sort of thing. A. Yes, sir.

Q. First of all, let me ask you the size of your facility.

A. Physical—

37 Q. Area. A. —area? Approximately 90 acres.

Q. Are all of the facilities contiguous? Do they touch? Or do you have— A. No, sir.

Q. —separate operations? A. They are divided by a river.

Q. I see. A. And by a street.

Q. And by a street? A. Yes, sir.

Q. Now, the river involved is the Sabine River, isn't it? A. Yes, sir.

Q. You are acquainted with the river, I take it? A. Pretty well.

Q. You have seen ships of considerable size go up and down it, have you not? A. Yes, sir.

Q. The Levingston Shipbuilding Yards are located below or let me put it this way:

The river is navigable for ocean going vessels above the location of your shipyard, is it not? A. For ocean going vessels of certain sizes, yes.

Q. Well, we are talking about a normal tanker or cargo vessel. A. Normal tanker, no, sir.

38 Q. A normal tanker it could not accommodate? A. Something—beg your pardon?

Q. You say it will not accommodate a normal tanker? A. A small tanker, yes.

Q. Well, take one of the T-2 type. Would it accommodate a T-2 tanker? A. Possibly, but not recommended.

Q. But it will accommodate tankers smaller than the T-2? A. Yes, sir.

Q. Cargo vessels, about what size will it accommodate? A. Smaller than a C-3 or C-4.

Q. Smaller than a C-3.

And that is typical for the river above your facilities? A. Approximately about two miles above.

Q. About two miles above.

And it's common all the way below your facility, from your facility to the channel? A. As far as we know, the ship channel is 32 feet in depth.

Q. Yes, sir.

And will accommodate ships of a draft less than 32 feet? A. Yes, sir.

Q. Now, a portion of your plant is located, I

39 believe, on an island? A. Yes, sir.

Q. And the balance of it is on the mainland shore of the river, is that correct? A. That's right, sir.

Q. What part of your operations do you carry on at the facility on the island? A. Well, it depends on the volume of construction work in the company at the time to determine about the percentage of work that is going on over there, but I would answer that in this respect, that we do a great deal of our erection, construction and outfitting on the island premises.

Q. I see.

Do you have ways both— A. We have construction ways, yes, sir.

Q. In both places? A. Both places, yes, sir.

Q. And do you do any repair work in addition to building vessels? A. Yes, sir.

Q. And what size vessels will your facilities accommodate? A. I beg your pardon, I wanted to clarify one thing.

Q. I am sorry. A. You mean does our company do repair work besides construction?

Q. Yes. A. Yes. I thought maybe you meant do we do most of it in certain areas.

Q. No, just that your company did do it. A. Our company does do both types of work.

Q. Yes. And what is the largest size vessel that the facilities of your company will accommodate? A. Well, that is rather difficult to answer. If you are referring to repair facilities—

Q. First, repair facilities. A. Our dry dock handles about 3,500 tons, that is, as far as dry docking is concerned.

Q. Yes. A. But as far as repair work is concerned, it can—anything that can get up the river we can handle.

Q. Yes, sir.

Now, in the construction end, what is the largest vessel your company has constructed? A. In tonnage weight?

Q. Yes. A. I really don't know the actual size. I could give you an estimate of what I think.

Q. That is all I want, just your best judgment about it.

A. Probably 8,500, 9,000 tons.

41 Q. I see.

Now, do you repair and construct both vessels and barges, both? Do you do work on both? A. Yes, sir, we construct them new from the keel all the way up.

Q. Yes, sir. A. All the way through to the completed job, and we also repair different types of vessels.

Q. Now, I take it you have various classifications of employees in your employment. A. Yes, sir.

Q. And you have got welders and riggers and other types of workers, do you not? A. Yes, sir, craftsmen of all types.

Q. And those people work both on repair work and on construction work, do they not? A. Generally speaking, they do.

Q. In other words, a welder, for example, in your yard today may be welding on a repair job and tomorrow may be welding on building a boat? A. That's correct. On in the shop or on maintenance.

Q. Or on land or in your shops or just wherever the work is? A. That's correct.

Q. And on any given day where you have either a
42 boat sic there for repair or construction, one or more of your various employees may be involved in the operation of either repairing or constructing the particular vessel. That is true, isn't it? A. That is true.

Q. And a man today may be working on a repair job on a boat in the water and tomorrow be working in your shop? A. That is true.

Q. And because of the nature of that type work that is the reason your company carries insurance both to cover the state workmen's compensation Act and the Longshoremen's and Harbor Workers' Act, isn't it? A. I don't know but I would say that is one of the reasons. I think it's required by law.

Q. Well, it would be a little silly to carry one if you didn't need it, wouldn't it? A. I would think so.

Q. Yes, sir.

Now, are you acquainted with the events that produced the injury to Roger McGuyer? A. To a great extent. I believe I know more about it than most people.

Q. I take it you were not an eye witness to the event? A That is correct. I was not.

Q. But in your capacity with the company you
43 necessarily investigated it? A. That is true.

Q. To ascertain what happened and why and that sort of thing? A. Yes, sir.

Q. And as I understand the matter, this event occurred on a vessel which you were in the process of constructing? A. Yes, sir.

Q. Can you tell me what type vessel it was and where she was? A. Yes, sir, I believe I can.

It was a barge that we were building for the Placid Oil Company, called, identified as job number 554 in our plant.

It was a slot type barge. It was so large that we had to build it in sections or two barges and join them together.

Q. Yes, sir. A. And it was approximately 120 feet wide and about 300 feet long.

Now, I could be wrong about the exact dimensions.

Q. I understand. A. I have that in the records, but I don't know the exact dimensions offhand.

The keel was laid in our plant on May 20, approxi-
44 mately, 1956.

Q. And was that on one of your ways there? A. Yes, sir.

Q. Was that— A. We have two keels, now. You have two barges, and we laid the keel on May 11th on the first one, and on May 20th on the second one, and they were launched in September and put into position, joined together, and—

Q. All right.

Now, then, let me get back. The portion of this barge that was begun on May 11th, was that begun on one of the ways in the yard. A. Both of those barges were built on the ways on the island, if that is what you are distinguishing the difference.

Q. Yes, sir. That is what I want to get at is where it was laid.

Was it laid on the island? A. Yes, sir.

Q. And were the two sections joined together before she was launched? A. I don't know, sir. I don't know. And I am not positive of the answer I just gave you about them being built on the ways on the island.

I recall they were on the island, but I could be mistaken.

Q. Well— A. We have a great volume of work
45 at times, and that is not exactly my type of business.

Q. Well, I realize you can't be certain but that is your best present recollection about the matter? A. That is true.

Q. Now, were the two sections of the barge joined together before either section was launched, or did you join them together after you launched them?" A. I don't know, sir.

Q. Had the two sections been joined together at the time of this explosion? A. Oh, yes.

Q. In other words, the keel of the vessel was laid and she was afloat on the Sabine River at the time of this explosion? A. The keel of the vessel—the hull was in the water, and we were putting structure on it. We were just getting started on the barge, actually.

We just had two barges side by side and we had joined them and we were getting ready to build the superstructure or the quarter sections, if you so call it, onto the top of the barge.

Q. Now, how far had the— A. Now, these two barges are one unit.

46 Q. Yes, I understand. A. They are one unit.

Q. Yes, I understand.

Now, how much of the structure other than the hull had been completed before the explosion? A. How much structure of the hull?

Q. How much structure other than the hull had you completed by the time of the explosion? A. Do you want an estimate in percentage of construction?

Q. Well, no, I would rather to have sort of a description of it first. A. Well, actually we only had the two barges, which were in the river together, joined together, and you build the structure from those barges, and we had gotten only up to about the laying the top deck on the—first deck on the superstructure. We had set the first section of six columns, approximately forty feet in height, against a 200 foot column. That is about as far as we had gotten. I would say on a percentage of construction basis, we were possibly fifty per cent complete on our whole job and only about ten per cent started on our superstructure.

Q. I see.

Now, what classification of workers did you have on the boat that day? A. What class of workers?

Q. Yes. Of course, you had— A. Most all types

47 of craftsmen.

Q. Well, name me a few. You had welders, at

least. A. I had welders, shipfitters, helpers, apprentices of various crafts, but in particular, welders and shipfitters, and electricians, possibly some painters and laborers. Possibly some crane operators and riggers.

Q. Now, let me ask you this:

Let's take a repair job—first, let me ask you this:

Was this barge intended as a tank type barge or cargo, or what? A. No, it's intended as a drilling unit for an oil company.

Q. A drilling unit for an oil company? A. Yes, sir.

Q. Do you know what draft the barge had? A. I believe it was sixteen feet, sir.

Q. Sixteen feet? A. I am not positive.

Q. Do you know how much— A. I believe that was the depth.

Q. Do you know how much draft she had at that time? A. Oh, draft?

Q. Yes. A. I thought you meant how much depth the barge tanks were. Oh, the draft, I would say it was
48 probably, oh, I would just guess it was possibly between six and eight feet.

Q. Well, now, this drilling barge we are talking about, in the hull structure were there living quarters being built in there? A. At that time we had not reached that phase of operation.

Q. You had not reached that phase. Had you reached the stage where you had any partitions in the hull? A. We had some bulkheads in the hull but not any—we had not reached the stage of construction where anything was completed.

Q. Yes, I understand that, but you did have some bulkheads? A. We had some bulkheads.

Q. Now, then, let's take a vessel in your yard for repair. It would not be uncommon, would it, to have welders, shipfitters, electricians, painters and riggers on the boat doing repair work all the time, all at the same time, would it? A. It would not be uncommon to have all craftsmen.

Q. That is what I say, it would not be uncommon and the welders would be welding just the same on one you were building as on one you were repairing? In other words, welding is welding whether a boat is being built

or being repaired, isn't that true? A. Well, that's
49 correct.

Q. And the same thing is true of the other classifications. A shipfitter is doing shipfitting work whether it's being done on a boat that is being constructed in the water or one that is being repaired in the water, isn't that true? A. I am sorry, I didn't quite hear you, sir?

Q. I say a shipfitter is doing shipfitting work whether he is on a vessel being constructed or whether he is on one that is being repaired? A. That's correct.

Q. And the same thing is true of the electricians, they do exactly the same thing, they do electrical work either way, that is true, isn't it? A. Within their craft jurisdiction, that's right.

Q. That is what I said. In other words, these crafts that you employ do the same type and kind of work whether they are working on a boat being constructed or one being repaired, the work is basically the same? A. That's correct.

Q. And this vessel that we are talking about involved in this accident was afloat on the river just like one that was completed, wasn't she? I mean she floated on the water just like a completed vessel? A. It was afloat, but it certainly wasn't in the condition of being accepted as safe.

50 Q. I understand they didn't want it to be put in use that day, but it floated just like one that was completed, didn't it? A. It floated.

Q. In other words, it didn't sink? A. It was floating.

Q. Let me ask you this question:

Are you familiar with cargo-type barges that are open, say, like a shell barge? A. What do you mean am I familiar with it?

Q. Have you seen them? A. I have seen some, yes, sir, but I might not be familiar with the dimensions and the details of them.

Q. I understand that. I understand that.

This barge that we are talking about in this lawsuit, could she have been loaded with some cargo, say, like some shell and towed? Was her hull that much completed? A. I don't believe.

Q. All right.

What part of her was so uncompleted that that couldn't have been done? A. Well, as far as if you are referring

to the fact that because it was a vessel that was floating and it had the size that you could pile stuff on it and it floated it down, that possibly you could by having
51 removed some of the superstructure off of it.

Q. That is what I am talking about, if you didn't have the superstructure there you could load it just like a shell barge and tow it, couldn't you? A. I would hesitate to answer that in an affirmative manner because I don't know whether you could be successful in towing it or not, but I think you could load quite a bit of stuff on it and it would float while it was loaded, but as to whether you could tow it or whether you could put it into some position, I don't know whether you could or not.

Q. If you had a tug big enough, you could move it, couldn't you? You had to move it, yourself, didn't you? A. Yes, we had to move it, ourselves, but we had difficulty moving it.

Q. Well, I understand you may have had some difficulty moving it, but as I understand it you had moved it around on the water, yourself, before this date. A. Only from the launching area to its present location, which is just a little ways.

Q. Even if it was only ten feet you had moved it on the water, had you not? A. Yes, we had moved it, but not all that many different times.

Q. Well, I understand there was probably only once or twice, but you had moved it on the water, had you
52 not? A. That's correct.

Q. One other question.

Are you acquainted with the mothball fleet on the Sabine around here? A. Well, I have seen the—

Q. You have seen it? A. I have seen the ships in the mothball fleet.

Q. It's above the shipyard, isn't it? A. Geographically, yes.

Q. Yes, that is what I mean, geographically it's above your shipyard. And those vessels are of what type that are laid up there? A. Well, they have various types of ships. They call them auxiliary service vessels to the fleet, to the 16th fleet. They have different types of vessels. Military vessels are what they are. But I don't know what various—

Q. They are sizable boats, aren't they? A. There are

several different sizes up there. Many different sizes, in fact.

Q. I say many of them are pretty sizable, aren't they? A. Yes, sir. Those vessels are not towed around, towed out by our shipyard to their area of location, though.

Q. I am sorry, I apparently didn't understand you, sir. A. I just said those vessels are not towed out by the shipyard to their area.

53 Q. Are you talking about the mothball fleet? A. To their location. That's correct.

Q. Oh, I didn't mean to imply that you had anything to do with them, at all. I just wanted to know if they were above your shipyard, geographically above it. A. Geographically, they are.

Mr. Wright: I believe that is all.

Cross Examination

By Mr. Nelson:

Q. You handle the claims for injuries received in the course of employment at your place of business? A. Yes, sir.

Q. How long have you been doing it? A. At Levingston, fifteen years.

Q. Has Levingston repaired and built new barges during that entire time? A. Yes, sir.

Q. Have you had injuries on new construction before? A. Yes, sir.

Q. Have you had claims for compensation before? A. Yes, sir.

Q. Have you always reported them to the Industrial Accident Board? A. On new construction, yes, sir.

54 Mr. Wright: I object to it as being immaterial.

The Deputy Commissioner: Oh, let it go. I don't see it makes any difference one way or the other.

By Mr. Nelson:

Q. Have they ever refused to take jurisdiction of one? A. No, sir.

Q. Since you have been there? A. No, sir.

Q. To your knowledge have they ever refused to take jurisdiction at this plant? A. No, sir.

Mr. Wright: May I have my objection to all this line of questioning?

The Deputy Commissioner: Yes. The objection is noted to the questions of the defense attorney.

By Mr. Nelson:

Q. You reported this to the Industrial Accident Board in accordance with the regulations within the period of time required? A. Yes, sir.

Q. On the employer's first report form? A. Yes, sir.

Q. And this was a drilling barge being built by your company? A. Yes, sir.

55 Q. From the bottom up? A. Yes, sir.

Q. When did you say it was launched? A. I could give you the exact dates. I think it was along about September 20th, I believe. If you want the exact dates, I have it in my records.

Q. If you have it there let's see when it was launched. A. The keel laid May 20th, 1956. Was launched September 27, 1956. The keel laid May 11th was launched November 7, 1956.

Q. Do you know what was done before, that is, at the time it was launched, what condition it was in? A. No, sir, I don't know what condition it was in. That was just the first step in building the barge is to build the hull, and it was such a size that we couldn't build it in one section, one unit. We had to build it in sections, so we built it in two sections and we put it in the water and joined the sections together, which is very commonly done in our type of operations.

Q. Did it have any decking on it? A. Yes, it had decking on the barge bottoms.

Q. When it was launched? A. Yes, sir.

Q. From that time on did it stay there at your
56 plant to be worked on or did it go elsewhere? A. No, sir, it stayed there at our shipyard until it was completed, about two months ago.

Q. How did you get on it? A. By way of a gangplank from the wharf to the barge.

Q. Was it attached to the land or wharf or anything? A. The barge, you mean?

Q. Yes. A. It was tied off onto the wharf as any vessel,

and the grounds from the welding cables and so forth from the land to the barge. It was tied by cable and it's tied by rope, and it's tied by gangplank.

Q. Did it have gangplanks permanently affixed or did you put them on every day? A. It had grangplanks affixed only for the period of time it was there in operation, I mean, there in construction. During all that time.

Q. During all that time you kept it attached to the wharf or the dock by permanent gangplanks, is that correct? A. That's right.

Q. You didn't have to go by boat out to get on this barge to go to work? A. No, sir.

Mr. Nelson: I believe that is all.

* * * * * * * * * * *

Report of Proceedings Filed October 4, 1960
Alton L. Curtis, *Clerk*

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57 IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

Civil Action No. 7873

THE TRAVELERS INSURANCE COMPANY
AND
LEXINGSTON SHIPBUILDING COMPANY

VS.

C. D. CALBECK, Deputy Commissioner for the Eighth Compensation District for the Bureau of Employees' Compensation, U. S. Department of Labor; ISABELL SCOTT McGUYER: THOMAS DALTON McGUYER: and CURTIS AUSTIN McGUYER

Opinion—Oct. 26, 1960

* * * * * * * * * * *

58 HUNTER, *Judge*:

McGuyer sustained a fatal injury while performing his duties as a welder aboard a drilling barge which had been launched and was afloat upon navigable waters. The barge,

approximately fifty per cent complete, had not been placed in navigation. The employer, Levingston Ship Building Company, had other employees engaged in maritime employment.

The widow, in behalf of herself and her children, filed a claim pursuant to the Longshoremen's and Harbor Workers' Act for compensation by reason of the death of her husband while in the employ of Levingston.

The Deputy Commissioner at first agreed with the contention of the plaintiff (Levingston Ship Building Company and its insurer, Travelers); however, subsequently he entered a new award whereby he held the Longshoremn's and Harbor Workers' Act applicable and awarded death benefits to the widow and children of McGuyer.

This suit was instituted by the employer and its insurer to enjoin the enforcement of the award of May 13, 1960 on the ground that new construction is non-maritime in nature, and therefore the death of deceased is compensable only under the Workmen's Compensation Act of the State of Texas. The Commissioner, defendant herein, has filed the original report of the proceedings taken before the Deputy Commissioner on June 13, 1958, together with a certified and true copy of the compensation order filed by the Deputy Commissioner on May 13, 1959.

59

The Law

The facts are simple and not disputed. The question is one of law only and may be stated to be:

> *Is compensation coverage under the State (Texas) or Federal (Longshoremen's and Harbor Workers' Compensation) Act?*

Travelers' position may be precisely summarized as follows: The deceased sustained his fatal injury while upon navigable waters of the United States, performing the work of a welder upon the hull of a barge that was afloat and still under construction; therefore, he was engaged at the time of his death in non-maritime work, and the State of Texas could and had validly provided a remedy which is an exclusive remedy. Plaintiff's con-

clusion is categorically supported by *United States Casualty Company* v. *Taylor, et ux*, 64 F. 2d 521, 4 C.C.A., 1933, and *Grant Smith-Porter Ship Company* v. *Rohde*, 42 S. Ct. 157, 257 U.S. 469, 1922.

We think the Supreme Court[1] and the Appellate Courts[2] have, by subsequent pronouncements, made it quite
60 clear that an employee's right under the Longshoremen's Act for an injury received on navigable waters depends not upon the particular employee's status, but rather upon whether or not his employer had "any * * * employees" engaged in maritime employment.

Here, McGuyer's death arose out of and in the course of his employment, and since Levingston had other employees engaged in maritime employment, and since McGuyer's death admittedly occurred upon navigable waters of the United States, his widow and children were entitled to compensation under the Act (Sec. 902, sub para. 2, and 903a, Title 33 U.S.C.A.: *Pennsylvania R. Co.* v. *O'Rourke*, 344 U.S. 334, 73 S. Ct. 302; *Dixie Sand and Gravel Corporation* v. *Holland*, 255 F. 2d 304, 6 C.C.A., 1958; *Flowers* v. *Travelers Insurance Co.*, 258 F. 2d 220, 5 C.C.A., 1958.

Conclusion

Plaintiff's prayer for a mandatory injunction is denied.

The Court has examined the record and the testimony and finds that the evidence on which the Commissioner relied amply supported his findings and required the entry of his order awarding compensation. We accept and adopt the findings of the Commissioner as being supported by substantial evidence and grant summary judgment to defendant.

61 Thus Done and Signed in Chambers at Lake Charles, Louisiana, on this the 25th day of October, 1960.

s/ Edwin F. Hunter, Jr.
United States District Judge

Filed October 26, 1960
Alton L. Curtis, *Clerk*

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[1] Pennsylvania R. Co. v. O'Rourke, 344 U.S. 334, 73 S. Ct. 302.

[2] Dixie Sand and Gravel Corporation v. Holland, 255 F. 2d 304, 6 C.C.A., 1958; Flowers v. Travelers Insurance Co., 258 F. 2d 220, 5 C.C.A., 1958.

IN THE UNITED STATES DISTRICT COURT

Order Granting Summary Judgment and Dismissal of Complaint—Nov. 3, 1960

This action came on to be heard upon the motions of defendants for Summary Judgment and the Court having given due consideration thereto and having heard the arguments of the respective counsel as contained in their briefs filed with the Court and having concluded that defendants are entitled to Summary Judment dismissing the Complaint, it is therefore hereby

ORDERED that the motions of the defendants for Summary Judgment and Dismissal of the Complaint are hereby granted.

62 THUS RENDERED and SIGNED at Lake Charles, La. on the 3rd day of November 1960.

s/ EDWIN F. HUNTER, JR.
United States District Judge

Filed November 4, 1960
ALTON L. CURTIS, *Clerk*

IN THE UNITED STATES DISTRICT COURT

Notice of Appeal—Filed Nov. 23, 1960

TO THE HONORABLE JUDGE OF SAID COURT:

Notice is hereby given that plaintiffs, The Travelers Insurance Company and Levingston Shipbuilding Company, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the Order entered herein on the 3rd day of November, 1960, whereby defendants' Motion for Summary Judgment and Dismissal of the Plaintiffs' Complaint was granted.

The specific point on which an appeal is taken is whether or not, under the facts and circumstances of this case, the death of Rogers D. McGuyer, who received fatal

63 injuries on July 8, 1957, while engaged in new construction for Levingston Shipbuilding Company upon an incompleted drilling barge lying in navigable water, comes within the jurisdiction of the Longshoremen's and Harbor Workers' Compensation Act, or is compen-

sable under the Workmen's Compensation Act of the State of Texas.

DATED this 23rd day of November, A.D. 1960.

STRONG, MOORE, PIPKIN, STRONG & NELSON
By s/ LOUIS NELSON
Attorneys for Plaintiffs, The Travelers Insurance Company and Levingston Shipbuilding Company.
319 McFaddin Building
P.O. Box 1632
Beaumont, Texas

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75 **Clerk's Certificate**

(Omitted in Printing)

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76 IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

That thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Fifth Circuit, viz:—

THE TRAVELERS INSURANCE COMPANY and
LEVINGSTON SHIPBUILDING COMPANY,

No. 18802. versus

C. D. CALBECK, Deputy Commissioner, Eighth Compensation District for the Bureau of Employees' Compensation, U. S. Department of Labor, ET AL.

Argument and Submission—May 1, 1961

On this day this cause was called and, after argument by Louis V. Nelson, Esq., for Appellant, and Herman Wright, Esq., and David L. Rose, Esq., Attorney United States Department of Justice, for Appellees, was submitted to the Court.

77 IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18802

THE TRAVELERS INSURANCE COMPANY AND LEVINGSTON SHIPBUILDING COMPANY, *Appellants*,

versus

C. D. CALBECK, DEPUTY COMMISSIONER, EIGHTH COMPENSATION DISTRICT FOR THE BUREAU OF EMPLOYEES' COMPENSATION, U. S. DEPARTMENT OF LABOR, ET AL., *Appellees*.

Appeal from the United States District Court for the Western District of Louisiana

Opinion—July 13, 1961

Before CAMERON, BROWN and WISDOM, Circuit Judges.

BROWN, Circuit Judge: We have again the old, old contest: is the claim for injuries to an amphibious worker under the State Compensation Act? Or is it under
78 the Federal Act?[1] Phrasing it differently, the question is all embracing. As to an occurrence of this type, has there been doubt and uncertainty in the past as to coverage? If not, what is there about contemporary developments which should now make twilight out of that which has been thought to be as clear as day or as black as night?[2] Specifically the question presented is whether a person injured while working on an uncompleted vessel then launched and afloat is navigable waters, but still under construction, is covered by the State Act, or the Longshoremen's Act, or perhaps either one or both depending on the injured party's ultimate choice under the "first-come-first-served"[3] Twilight Zone option?

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[1] Longshoremen's and Harbor Workers' Compensation Act, 33 USCA §§901-950.

[2] By rare coincidence the identical question is before us in a separate case from a different district. Argued and submitted on the same day, it has been decided this day. Avondale Shipyards, Inc. v. P. J. Donovan, Deputy Commissioner, 5 Cir., 1961, ... F. 2d ....., ... AMC ..... [No. 18,695].

[3] Davis v. Department of Labor of Washington, 1942, 317 U. S. 249, 63 S. Ct. 225, 87 L. Ed. 246, 1942 AMC 1653, was so characterized in De Bardeleben Coal Corp. v. Henderson, 5 Cir., 1944, 142 F. 2d 481 at 483.

Again, as we remarked before, "the facts, strikingly simple, neither complex nor conflicting, are not the cause of bewilderment." *Flowers* v. *Travelers Ins. Co.*, 5 Cir., 1958, 258 F. 2d 220 at 224. The Employer operates a shipyard on the Sabine River. At the shipyard it builds new vessels and also repairs completed ships. Its employees, including welders, perform work both on repairs and on construction. There is constant interchange between the two types of work. The Employee McGuyer on July 15, 1957 was injured while working on an oil drilling barge then under construction. The barge had been launched and the superstructure was being built. While McGuyer
79 was welding on the port side of the deck, a tank exploded causing severe head injuries from which he died three days later. The drilling barge had never been used in navigation, and there was still substantial work to be done before it could be so utilized.

In proceedings before the Deputy Commissioner[4] the original Compensation Order made on February 18, 1959, rejected the claim for death benefits filed by the widow and children. The Deputy Commissioner went right to the heart of the matter. As the reason for rejecting the claim, he formally stated that "It has not been held that the work on an uncompleted vessel comes within the provisions of the Longshoremen's and Harbor Workers' Compensation Act."

But while that was thought to be the final order it was not. Indeed, a year and a half later the final Award now under review was a complete reversal and held that the Longshoremen's Act did apply. In review proceedings that Order was twice remanded to the Deputy Commissioner.[5] Except that there was an elaboration on essentially incon-

[4] United States Department of Labor, Bureau of Employees' Compensation.

[5] Apparently the Employer took an appeal under 33 USCA §921(b) from the original Order of February 18, 1959. The Court remanded the case for further proceedings for the Deputy Commissioner "to reconsider the question of the situs of injury to be in Orange, Texas." By a modification award on July 30, 1959, the order was amended to show the situs to be Calcasieu Parish, Louisiana. The Order as thus amended, denying benefits for want of coverage, was again brought before the Court. On April 20, 1960, the Court again remanded it to the Deputy Commissioner "in order to permit him to make findings and conclusions in accordance with the facts and the law."

sequential details, the last Award of May 13, 1960, with no explanation for the change of decision, now declared
80 the injury subject to the Longshoremen's Act and made an Award of death benefits. The record, as such, does not spell out this change of heart. On the argument, however, there was general agreement by all counsel that this change in the Deputy Commissioner's decision was largely the result of a like change of view by the Bureau of Employees' Compensation concerning the underlying legal question of coverage for new construction. For reasons we later discuss, we regard this change as significant, not because either counsel or court consider this an intrusion into the independent adjudicatory functions of the Deputy Commissioner, but rather as a convincing demonstration that until these two cases[6] there was no serious contention that new construction work was covered.

While this problem has its genesis in the constitutional travail which gave birth to *Jensen*,[7] which despite severe criticism displays a remarkable tenacity so that each year sees fresh evidence of its continued vitality, *Kossick* v. *United Fruit Co.*, 1961, ... U. S. .... S. Ct. ...., 6 L. Ed. 2d 56, our inquiry is no longer on that level. Now it is simply a question of statutory construction to determine, not how far Congress could have gone, or what Congress had to do, but rather what Congress did.[8]

[6] See note 2, supra.

[7] Southern Pacific Co. v. Jensen, 1917, 244 U. S. 205, 37 S. Ct. 524, 61 L. Ed. 1086.

[8] To the synopsis in *Flowers*, supra, 258 F. 2d 220 at 221, note 2, may be added that developed in some subsequent cases of this Court. T. Smith & Sons, Inc. v. Williams, 5 Cir., 1960, 275 F. 2d 397 at 398-401; Atlantic & Gulf Stevedores, Inc. v. Donovan, 5 Cir., 1960, 274 F. 2d 794, 1960 AMC 1311, modified on rehearing, 279 F. 2d 75; Noah v. Liberty Mutual Ins. Co., 5 Cir., 1959, 265 F. 2d 547, 1959 AMC 573, overruled on rehearing en banc 5 Cir., 267 F. 2d 218, 1959 AMC 2047; Thibodeaux v. J. Ray McDermott & Co., 5 Cir., 1960, 276 F. 2d 42.

81 That question of statutory construction centers around § 903(a)[9] which defines the coverage of the Longshoremen's Act in terms which are jurisdictional in nature and impact. *Crowell* v. *Benson*, 1932, 285 U. S. 22, 52 S. Ct. 285, 76 L. Ed. 598. Precisely the question relates to prerequisite [2] "if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law."

We start with an historic legal fact. In 1922 five years before the enactment of the Longshoremen's Act in response to the constitutionally unsuccessful efforts to adopt state compensation laws for maritime workers, the Supreme Court dealt with this very situation. With *Jensen* then, as now, a matter of everyday preoccupation, the Court held that Oregon could provide workmen's compensation to a person injured while working on an uncompleted vessel then under construction and afloat in navigable waters. *Grant Smith-Porter Ship Company* v. *Rohde*, 1922, 257 U. S. 469, 42 S. Ct. 157, 66 L. Ed. 321. That the line was drawn precisely on uncompleted construction versus repair of a completed vessel is demonstrated overwhelmingly by contemporary cases upholding the supremacy of admiralty and prohibiting the application of state compensation acts to injuries received by those

82 repairing existing vessels.[10] Rejecting the contention of the injured repairman that "when hurt he was doing work of a nature which had no direct relation to navigation or commerce; and to permit application of

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[9] The numbers in brackets [1] and [2] are inserted to emphasize the two distinctive separate jurisdictional requirements:

33 USCA §903(a). "Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if [1] the disability or death results from an injury occurring upon the navigable waters of the United States (including any drydock) and if [2] recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law."

[10] John Baizley Iron Works v. Span, 1930, 281 U. S. 222, 50 S. Ct. 306, 74 L. Ed. 819, 1930 AMC 735; Robins Drydock & Repair Co. v. Dahl, 1925, 266 U. S. 449, 45 S. Ct. 157, 69 L. Ed. 372, 1925 AMC 182; Great Lakes Dredge & Drydock Co. v. Kierejewski, 1923, 261 U. S. 479, 43 S. Ct. 418, 67 L. Ed. 756, 1923 AMC 441; Gonsalves v. Morse Dry Dock & Repair Co., 1924, 266 U. S. 171, 45 S. Ct. 39, 69 L. Ed. 228, 1924 AMC 1539; Messel v. Foundation Co., 1927, 274 U. S. 427, 47 S. Ct. 695, 71 L. Ed. 1135, 1927 AMC 1047.

the state Workmen's Compensation Act would work no material prejudice to the essential features of the general maritime law as in Grant Smith-Porter Ship Co. v. Rohde * * *," the Court went on to pinpoint the very ground of distinction. "In Grant Smith-Porter & Co. v. Rohde, supra, claimant when injured was working upon an incompleted vessel—a thing not yet placed into navigation, and which had not become an instrumentality of commerce." *Baizley Iron Works* v. *Spun*, *supra*, 281 U. S. 222 at 230, 231.

And the line which the Court drew in the pre-1927 days was the line which Congress adopted in §903(a), note 9, supra. The Court itself has said so in the plainest of terms, often repeated.[11] "The main impetus for the longshoremen's * * * Act was the need to correct a gap made plain by decisions of this Court. We believe that there is only one interpretation of the proviso in §3(a) which would accord with the aim of Congress: the field in which a state may not validly provide for compensation must be taken, for the purposes of the Act, as the same field which the Jensen line of decision excluded from state compensation laws. Without affirming or rejecting the *constitutional* implications of those cases, we accept them as the measure by which Congress intended to mark the scope of the Act they brought into existence." *Parker* v. *Motor Boat Sales, Inc.*, 1941, 314 U. S. 244 at 250, 62 S. Ct. 221, 86 L. Ed. 184, 1942 AMC 1.

Of course in this analysis we may not ignore the Twilight Zone concept announced by *Davis*, supra. In effect it holds that where it is difficult to ascertain what the line is,

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[11] In Davis v. Department of Labor of Washington, 1942, 317 U. S. 249 at 256, 63 S. Ct. 225, 87 L. Ed. 246, 1942 AMC 1653, the Court stated: "In our decision in Parker v. Motor Boat Sales * * * we held that Congress has by the Longshoremen's Act accepted the Jensen line of demarcation between state and federal jurisdiction."

Even more recently in Pennsylvania Ry. Co. v. O'Rourke, 1952, 344 U. S. 334, 73 S. Ct. 302, 97 L. Ed. 367, 1953 AMC 237, it first stated, "This Act and the Jones Act provided means for indemnification for injuries for all maritime employees who were beyond the constitutional reach of state legislation." The Court went on to declare: "A quarter of a century of experience has not caused Congress to change the plan. The '*Jensen* line of demarcation between state and federal jurisdiction' has been accepted." 344 U. S. 334 at 337.

or on which side of any such assumed line the facts put a particular case, "an injured waterfront employee" was given "an election to recover compensation under either the Longshoremen's Act or the Workmen's Compensation Law of the State in which the injury occurred." *Haka* v. *Ross Island Sand & Gravel Co.*, 1959, 358 U. S. 252 at 273, 79 S. Ct. 266, 3 L. Ed. 2d 292. But neither *Davis* nor *Moore*[12] nor *Baskin*[13] were intended to make everything twilight merely because the injury occurred near the waterfront to one who worked in, on, under or around it. The Twilight Zone concept was "devised to solve cases 84 in, not to create, the twilight." *Flowers* v. *Travelers Ins. Co.*, *supra*, 258 F. 2d at 228. Indeed, *Davis* properly understood is a recognition that there are *some* activities and some areas in which the *Jensen* line is clear and distinct. As to those the command of Congress is emphatic: those on the "admiralty" side are exclusively covered by the Longshoremen's Act; those on the "maritime but local"[14] side are state.

There is here more than the normal compulsion to heed the congressional command simply because it is the law. Here there is an imperative necessity. All—courts, judges, counsel, employers and employees in the industrial maritime field, insurers and marine underwriters—deplore the uncertainty in this problem. Recognized, of course, is the inescapable fact that from the nature of this overlapping of state and federal sovereignty, the problem at times is serious and substantial and, like Mordecai at the Gate, simply will not go away. But in those areas—rare as they might be—in which there is clarity, in which the line is

[12] Moore's case, 1948, 323 Mass. 162, 80 N. E. 2d 478, 1948 AMC 1862, affirmed per curiam, sub nom. Bethlehem Steel Co. v. Moore, 1948, 335 U. S. 874, 69 S. Ct. 239, 93 L. Ed. 417.

[13] Baskin v. Industrial Accident Commission, 1949, 338 U. S. 854, 70 S. Ct. 99, 94 L. Ed. 523, reversing, per curiam, 89 Cal. App. 2d 632, 201 Pac. 2d 549; on remand to the state court, 97 Cal. App. 2d 257, 217 Pac. 2d 733, affirmed per curiam, Kaiser Co., Inc. v. Baskin, 1950, 340, U. S. 886, 71 S. Ct. 208, 95 L. Ed. 643.

[14] The *Jensen* problem does not arise unless there is a conjunction of (1) an injury and (2) its occurrence on navigable waters. Where the injuries occur on land or what is deemed an extension of land, the maritime law has no application at all. State Industrial Commission v. Nordenholt Corp., 1932, 259 U. S. 263 at 275-76, 42 S. Ct. 473, 66 L. Ed. 933.

clearly drawn, in which it may be said with some competent assurance that it is either one or the other, effectual enforcement of the socially desirable aim of securing a speedy determinable money indemnity under the operation of automatic self-executing[15] compensation statutes requires that courts have the resourcefulness to ascertain, and
85 when ascertained, the fortitude to stand by the declaration of an identifiable line.

Such considerations have cut a large figure in the disposition this Court has made in two well-defined areas. Where from contemporary action by state courts in the maritime states of this Circuit the pre-existing certainty was imperiled by the beguiling appeal of a free-wheeling election or the assertion that what had been clear was now Twilight, this Court, not without some travail of its own, hewed to the line. Longshoremen, loading or unloading vessels on navigable waters were restored once and for all to the place where Jensen put them. *Noah* v. *Liberty Mutual Ins. Co.*, *supra*, note 8. This stand has more than restored symmetry within the federal establishment of this Circuit. It has, without a doubt, been a substantial factor in the decisions of the state courts. If federal courts who are charged primarily with the immediate responsibility of elucidating the statutory and constitutional principles which inhere in this acute problem of federalism stand fast, it encourages, if not assures, a cohesive, consistent, harmonious treatment by our counterparts in the state judiciaries. Thus, for example, did the confidence in the ultimate rightness of the decision of Louisiana courts, expressed without reservation in *T. Smith & Son, Inc.* v. *Williams*, 5 Cir., *supra*, 275 F. 2d 397, turn out to be well founded. This was accomplished without the aid of the much sought for Federal injunction against prosecution in the state court of claims under the Louisiana Workmen's Compensation Act or the necessity or artful constructions of the anti-injunction statute, 28 USCA §2283. Louisiana has now spoken in terms as positive as *Noah*. Longshore-

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[15] We have several times outlined the self-executing nature of the Longshoremen's Act. Flowers v. Travelers Ins. Co., supra, 258 F. 2d 220 at 225-27; Atlantic & Gulf Stevedores, Inc. v. Donovan, 5 Cir., 1960, 274 F. 2d 794 at 799-801; and T. Smith & Son, Inc. v. Williams, supra, 275 F. 2d 397 at 400, note 11.

men are not in the Twilight. Longshoremen are in the federal area only. The Louisiana State Compensation Act may not validly apply to them. *Ellis* v. *Travelers Ins. Co.*, 1961, ... La. ....., 129 So. 2d 729; consolidated with *William Stepter* v. *T. Smith & Son, Inc.*, 1961, ... La. ....., 129 So. 2d 740, affirming the Court of Appeals, 123 So. 2d 780 and 788, respectively.

Likewise, in the face of some state court decisions which we have expressly declined to approve or follow, have we spoken in positive terms as to ship repairers. A ship repairer is not in the Twilight. He is in the federal domain. The State Act may not validly apply. *Flowers* v. *Travelers Ins. Co., supra*, 258 F. 2d 220.

It may seem to be unimportant that a restricted category of workers on new construction should be classified so sharply. But it is of such stuff that the certainty so badly needed in the routine operation of any compensation program will come. The converse is true. The moment what has been thought to be daylight or dark now becomes Twilight, the whole process becomes encumbered with the collateral and disruptive controversy which comes to an end authoritatively only after a long struggle culminating in a *Noah* or a *Flowers* decision.

The Supreme Court drew the line. For those working on uncompleted vessels afloat state compensation acts may validly apply. Congress adopted that line in §903(a). There is no shadow. There is no obscurity. There is no uncertainty. It is as clear as it was in 1922 that such injuries are for state compensation.

None of the argument offered to overcome this simple, but positive, lesson of history in action is of any merit. The main contention is that *Grant Smith-Porter Co.* was a "maritime but local" case. Two things are then asserted. The first is that the legislative history, meager and scarce as it is on this point,[16] made no reference to the "local concern" doctrine. This rests in part on the fact that the Committee Report in its statement that maritime workers are "unfortunately * * * excluded from" state laws and that the "Supreme Court has more than once held that Federal legislation cannot,

[16] See the Senate Judiciary Committee Report, S. R. 69 Cong. 1st Sess., Vol. 3, Rep. 973, p. 916; and H. R. 1767, 69 Cong. 2nd Sess., p. 19.

constitutionally, be enacted that will apply State laws to this occupation." cited, in addition to *Jensen*, only the two cases holding Congress could not adapt state legislation.[17] That, it is urged, demonstrates that Congress was not legislating with the other cases in mind. But the Supreme Court has not read the legislative history that narrowly (see note 11, supra and appended text). When reference was made to *Jensen*, Congress thought, just as do judges, courts and lawyers today, of the whole thing turned loose by that auspicious doctrine. Part of that struggle, inherently part and parcel of the compelling supremacy of the admiralty in the areas where uniformity was essential, was the reflex of that—the area in which application of local laws would not work any "material prejudice to the general maritime law." *Western Fuel Co.* v. *Garcia*, 1921 257 U. S. 233, 42 S. Ct. 89, 66 L. Ed. 210.

That concept of maritime but local is still valid.[18] The problem is all wrapped up together. The name
88 *Jensen* is a shorthand abbreviation that embraces all. This is manifest from the very recent declaration by the Court in *Kossick* v. *United Fruit Co.*, 1961, ... U. S. ...., ... S. Ct....., 6 L. Ed. 2d 56 at 62, ... AMC ..... "This brings us, then, to the remaining, and what we believe is, the controlling question: whether the alleged contract, though maritime, is 'maritime and local.' *Western Fuel Co.* v. *Garcia*, 257 U. S. 233, 242, * * * in the sense that the application of state law would not disturb the uniformity of maritime law, *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205 * * *." And in the context of this compensation struggle, like language was used in *Hahn* v. *Ross Island Sand & Gravel Co.*, *supra*, 358 U. S. 272. Of *Davis* the Court said, "* * * we recognized that in some cases it was impossible to predict in advance of trial whether a worker's injury occurred in an operation which, although maritime in nature, was so 'local' as to allow state compensation laws validly to apply under the limitation of *Southern P. Co.* v. *Jensen* * * *." In view of these strong

[17] These were Knickerbocker Ice Co. v. Stewart, 1920, 253 U. S. 149, 40 S. Ct. 438, 64 L. Ed. 834; State of Washington v. W. C. Dawson & Co., 1924, 264 U. S. 219, 44 S. Ct. 302, 68 L. Ed. 646, 1924 AMC 403.

[18] See note 14, supra.

contemporary recognitions of the vitality of the maritime but local concept and our present "clear duty to consider carefully what the law is on this important and far-reaching question." *River Terminals Corp.* v. *Southwestern Sugar & Molasses Co.*, 5 Cir., 1958, 253 F. 2d 922 at 925, 1958 AMC 1534, affirmed and remanded, 1959, 360 U. S. 411, 79 S. Ct. 1210, 3 L. Ed. 2d 1334, 1959 AMC 1631; 274 F. 2d 36, 1960 AMC 2064, expressions in some of our prior cases cannot be controlling. In several it has been said or implied that the consequence of the enactment in 1927 of the Longshoremen's Act was a congressional declaration that "maritime but local" no longer applied. The reasoning essentially was that by virtue of the Longshoremen's Act "Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject matter." *Continental Casualty Co.* v. *Lawson*, 5 Cir., 1933, 64 F. 2d 802 at 805, 1933 AMC 794. At another time it was phrased this way. "No ground should be yielded to state jurisdiction in cases falling within the principle of the *Jensen* case * * *." *De Bardeleben Coal Co.* v. *Henderson*, *supra*, 142 F. 2d 481 at 484. But as the recent cases show without doubt, this ignores element (2), see note 9, supra, of the coverage clause. That was made plain in *Davis*, supra. After reviewing the unsuccessful efforts of Congress to adopt state compensation acts, it said of the Longshoremen's Act: "Here again, however, Congress made clear its purpose to permit state compensation protection whenever possible by making the federal law applicable only 'if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law.' " 317 U. S. 249 at 252-53. And *O'Rourke* and *Haley* are fresh reminders that element (2) makes the inquiry indispensable. Moreover that inquiry, when made, ultimately has to be in the classic terms embodied in the "maritime but local" formula.[19]

[19] In *Davis* the formula was translated into these terms: "* * * It must be remembered that under the Jensen hypothesis basic conditions are factual: Does the state law 'interfere with the proper harmony and uniformity of' maritime law?" *Davis* v. Department of Labor, supra, 317 U. S. 249 at 254.

This analysis disposes, at the same time, of all of the dry-dock or marine railway cases[28] even though plausible
90 arguments from analogy may be constructed that if a marine railway on land is within the coverage, a floating uncompleted hull should likewise be. But these cases do not overcome the categorical pre-1927 holding, adopted by Congress in §903(a), that injuries on an uncompleted vessel afloat but still under construction may, in the words of the statute, be "validly * * * provided by state law."

Nor does *O'Rourke*, supra, require any different result. We pointed out in *Flowers* that this case in the resolution of some of these problems "has, in our judgment, been given altogether too little attention." 258 F. 2d 220 at 223. The case, we stated, "added the further and entirely new concept that where coverage of §903(a) is applicable, the exclusive liability of §905 does not depend on the nature or character of the work being done by the injured employee as long as (1) that injury occurs on navigable waters and (2) the employer is such a person 'any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States * * *.' §902(4)." 258 F. 2d 220 at 224. But that does not come into play until it is first determined whether the case is within §903(a) and that requires a finding under element (2), see note 9, supra.

As a final thrust it is then insisted that even though "maritime but local" still survives, this is a Twilight case under *Davis*. But what, apart from those very decisions of the two Deputy Commissioners affirmed by two District Courts, brings about the haze of uncertainty? It was clear enough for the Deputy Commissioner to first rule that "It has not been held that the work on an uncompleted vessel

[28] See from this Court: Maryland Casualty Co. v. Lawson, 5 Cir., 1939, 101 F. 2d 732, 1939 AMC 129; Massachusetts Bonding & Ins. Co. v. Lawson, 5 Cir., 1945, 149 F. 2d 853, 1945 AMC 878; Avondale Marine Ways v. Hudson, 7 Cir., 1953, 201 F. 2d 147, 1953 AMC 432, affirmed, 346 U. S. 366, 74 S. Ct. 109, 98 L. Ed. 57, 1953 AMC 1900. Also from other Circuits: United States Casualty Co. v. Taylor, 1 Cir., 1933, 64 F. 2d 521, 1933 AMC 1290, no longer followed, see Travelers Ins. Co. v. McManigal, 4 Cir., 1944, 139 F. 2d 249, 1944 AMC 377, and Newport News Shipbuilding & Drydock Co. v. O'Hearne, 4 Cir., 1951, 192 F. 2d 988; Western Boat Bldg. Co. v. O'Leary, 9 Cir., 1952, 198 F. 2d 409, 1952 AMC 1639.

comes within the provisions of the Longshoremen's
91 * * * Act." For this February 1959 declaration the Administrator acting within the confines of the Fifth Circuit had some fairly substantial, if not infallible, grounds in the expressions which we made in 1958 in *Flowers*. To acknowledge that this statement may perhaps properly be characterized as dicta does not detract from the fact that this Court in drawing the line for ship repairers thought it necessary to consider that group in contrast to those engaged in new construction and in doing so used very positive language. "In contrast to" repair of a completed vessel, we declared, "work on an uncompleted hull before it has become a ship is not under Federal coverage and is, on the contrary, under State jurisdiction: *Grant Smith Porter Ship Co.* v. *Rohde* * * *," 258 F. 2d 220 at 222, note 5.[21]

It is surprising, indeed, that with *Grant Smith-Porter Co.* still very much alive in its 49th year and the Longshoremen's Act now in its 4th decade of operations, a thing as well settled as this has suddenly become confused. *Davis* with all of its "Theoretic illogic," 317 U. S. 247 at 259 (concurring) is, as the Court's decisions reflect, "a practical solution to a practical problem," 358 U.S. 272 at 274 (dissenting). It does not serve that function if it is used as a basis for finding new uncertainty, of creating, not solving, doubt.

92 It is no answer to urge that the distinction at times conceivably may produce results that are extremely fine. That is the inevitable likelihood in dealing with strict jurisdictional lines. The Constitution at times sets up a barrier at the water's edge. It probably does not make much sense from an operational standpoint that a longshoreman injured while handling one end of a bale of cotton on the dock has a state remedy only whereas his counterpart injured when the other end drops while he stands with

[21] It would be doctrinaire to quibble over the phrase "before it has become a ship" as does the Deputy Commissioner's brief in reliance on Tucker v. Alexandroff, 1902, 183 U. S. 424, 22 S. Ct. 195, 46 L. Ed. 264. In any event, in a situation involving the nature of the building of a ship, in contrast to the repair of an existing vessel, the Supreme Court sharply restricted the *Tucker* case. Thames Towboat Co. v. Schooner Francis McDonald, 1920, 254 U. S. 242 at 244, 41 S. Ct. 65, 65 L. Ed. 245.

both feet on the ship's deck must go the federal route. Nor is it any more appealing that a welder fabricating a repair fitting on the dock adjacent to a completed ship is a state case whereas a fellow welder on the ship's deck working on precisely the same fitting must look exclusively to the Longshoremen's Act.

We know by now that nothing written in this field is the last word. All it can be is "the latest word." *T. Smith & Son, Inc.* v. *Williams*, *supra*, 275 F. 2d 397 at 407. Until there is a further word, this Court, for one at least, has three clearcut categories: (1) longshoremen working on a ship and (2) repairmen working on a completed vessel are under the Longshoremen's Act; (3) persons working on an uncompleted vessel afloat but under construction are covered by the state act. Thus do we afford to "these hard-working men, engaged in a somewhat hazardous employment, the justice involved in the modern principle of compensation * * *"[22] by a proceeding which is certain and swift and virtually self-executing. The congressional policy reflected in element [2] of §903(a) has freed this remedy for these workers from the agony of case-by-case adjudication with the portentous constitutional overtones[23] involved in nearly every such claim and which, for scholars and historians may be interesting, if not decisive, but which hardly offer a solution to the pressing, immediate, urgent problem of the injured worker, his employer and its insurance carrier.

93

The compensation order was not in accordance with law and must be set aside. 33 USCA §921(b).

REVERSED AND RENDERED.

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[22] S. R. 69th Cong., 1st Sess., Vol. 3, Rep. 973, p. 916; see n. to 16, supra.

[23] This is no better illustrated than in the complex field of maritime death actions. See Thibodeaux v. J. Ray McDermott & Co., 5 Cir., 1960, 276 F. 2d 42 at 47, note 6, and Emerson v. Holloway Concrete Products Co., 5 Cir., 1960, 282 F. 2d 271 at 281, notes 10 and 11 (dissenting) for a summary of the shifting position and alignment of the several Justices; and see Currie, *Federalism and Admiralty, The Devil's Own Mess*, 1960, The Supreme Court Review 158; Baer, *At Sea With The United States Supreme Court*, 38 N. C. L.Rev. 307 (1960).

94 No. 18802.

THE TRAVELERS INSURANCE COMPANY AND LEVINGSTON SHIPBUILDING COMPANY,

versus

C. D. CALBECK, Deputy Commissioner, Eighth Compensation District for the Bureau of Employees' Compensation, U. S. Department of Labor, ET AL.

Judgment—July 13, 1961

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and here rendered for the appellants, The Travelers Insurance Company and Levingston Shipbuilding Company.

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97 **(Clerk's Certificate** to foregoing transcript omitted in printing)

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1 IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

AVONDALE MARINE WAYS, INC.

VS.

P. J. DONOVAN, Deputy Commissioner Seventh Compensation District, Bureau of Employee's Compensation, U. S. DEPARTMENT OF LABOR and MINUS AIZEN

• • • • • • •

2 **Complaint to Enjoin Compensation Order Under Longshoremen's and Harbor Workers' Compensation Act—Filed February 8, 1960**

1.

Avondale Marine Ways, Inc. is a corporation organized under the laws of Louisiana with its principal offices in

this judicial district; P. J. Donovan is the Deputy Commissioner, Department of Labor, Bureau of Employees' Compensation, Seventh Compensation District with principal offices in this judicial district; Minus Aizen is of the age of majority and is a resident of the Parish of LaFourche, State of Louisiana, in this judicial district. Jurisdiction of this Honorable Court exists under the provisions of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A., Sec. 901 *et seq.*) and rests on the fact that a Compensation Order was made by the defendant Deputy Commissioner purporting to act under the said statute. The action of the Deputy Commissioner ought to be enjoined, suspended and set aside because the said Deputy Commissioner has no jurisdiction over the claim of Minus Aizen made herein for the reason that the said claim does not come within the purview of the Longshoremen's and Harbor Workers' Compensation Act, but falls exclusively within the coverage of the Louisiana Workmens' Compensation Statute (R. S. 23:1021 *et seq.*).

2.

This complaint is filed for the purpose of reviewing, enjoining enforcement of and setting aside, as not in accordance with the law or the evidence, the Order, Findings of Fact and Award of defendant P. J. Donovan, Deputy Commissioner in Case No. 434-328, dated January 27, 1960 directing plaintiff to pay to defendant Minus Aizen certain benefits under the Longshoremen's and Harbor Workers' Compensation Act commencing on March 17, 1960.

3.

As will more fully appear by the attached copy of the said Compensation Order, which is made part hereof, claimant Minus Aizen was employed by plaintiff at Avondale, Louisiana as a tack welder and on August 11, 1956, while engaged as such in the scope and course of his employment on a barge then under construction, suffered certain personal injuries in an accident.

4.

Plaintiff avers that the hearing before the Deputy Commissioner in which the said Compensation Order was based

was held under a stipulation of fact which shows among other things that at the time of the accident the barge was lying afloat and moored in the Mississippi River and was 57% complete both in man hours and dollar value. Plaintiff further avers that the Deputy Commissioner found as a fact in accordance with the said stipulation that the barge was in an uncompleted status at the time Aizen was injured.

4

5.

Plaintiff avers that valid provision is made in the Louisiana Workmens' Compensation Statute (La. R. S. 23:1035) for compensation for the said injuries to defendant Aizen and that plaintiff has been making since the date of the aforesaid accident and continues to make weekly compensation payments to defendant Aizen in the maximum amount set forth in the said statute.

6.

Plaintiff avers therefore that the Compensation Order and Award complained of are not in accordance with the law and the evidence and are invalid for the reason that the accident on which the award is based took place while defendant was working on new construction and the Deputy Commissioner was therefore without jurisdiction or authority to make or render any Compensation Order or Award.

7.

Plaintiff further avers that if the Longshoremen's and Harbor Workers' Compensation Act be construed to provide compensation in this case, the said construction would render it null and void as beyond the power of Congress to enact under the Constitution of the United States.

8.

Plaintiff has no adequate remedy at law and has no means of obtaining redress of the wrong complained
5 of except through injunction proceedings, mandatory or otherwise, to enjoin, annul and set aside the Compensation Order and Award of compensation complained of herein.

9.

Plaintiff further avers that an interlocutory injunction should be issued to be effective during the pendency of these proceedings restraining enforcement of the said Order for the reason that Minus Aizen is impecunious and that plaintiff would be unable to recover from him any payments made pursuant to the said Compensation Order in the event the same were found to be erroneous by this Honorable Court or on appeal.

WHEREFORE, plaintiff prays that an interlocutory injunction be issued enjoining during the pendency of these proceedings defendants P. J. Donovan, Deputy Commissioner, and Minus Aizen, their agents and servants and all persons acting under or through them, from enforcing the Compensation Order issued on January 27, 1960 in Case No. 434-328 and that upon final decree the said Compensation Order be annulled, reversed, and set aside and its enforcement permanently enjoined, and that an order be rendered denying defendant Minus Aizen compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act, and further that plaintiff have and obtain such other orders, decrees and relief as equity, law and the nature of the case may require.

/s/ CHARLES KOHLMEYER, JR.
Charles Kohlmeyer, Jr.

6

/s/ H. MARTIN HUNLEY, JR.
H. Martin Hunley, Jr.
1836 National Bank of Commerce
New Orleans 12, Louisiana
Attorneys for Avondale Marine Ways, Inc., Plaintiff

LEMLE & KELLEHER
Of Counsel

IN THE UNITED STATES DISTRICT COURT

Answer of Minus Aizen—Filed February 24, 1960

To the Honorable the United States District Court for the Eastern District of Louisiana, New Orleans Division, and the Judges Thereof:

NOW INTO COURT, through his undersigned counsel, comes defendant, Minus Aizen, and, for answer to the complaint filed herein by the plaintiff, respectfully alleges, avers and shows unto this Honorable Court that:

1.

The allegations of Article 1 of the complaint are denied, except that defendant admits that Avondale Marine Ways, Inc., is a corporation organized under the laws of the State of Louisiana, with its principal offices in this judicial district; that P. J. Donovan is the Deputy Commissioner, Department of Labor, Bureau of Employees Compensation, Seventh Compensation District, with principal offices in this judicial district; that Minus Aizen is of the full age
7 of majority and a resident of the Parish of La-Fourche, State of Louisiana, in this judicial district; that the jurisdiction of this Honorable Court exists under the provisions of the Longshoremen's & Harbor Workers' Compensation Act; and that a compensation order was made by the aforementioned Deputy Commissioner under said statute;

2.

Article 2 of the complaint is denied except that the defendant admits that an order, findings of fact and an award of compensation was made by the Deputy Commissioner in favor of the defendant, Minus Aizen, which said order, findings of fact and award of compensation, your defendant respectfully avers, are the best evidence of their contents;

3.

The allegations of Article 3 are admitted;

4.

The allegations of Article 4 are admitted;

5.

The allegations of Article 5 of the complaint are denied, except that the defendant admits that the plaintiff has been paying him $35.00 per week since the date of his injury on August 11, 1956;

6.

The allegations of Article 6 of the complaint are denied;

8 7.

The allegations of Article 7 of the complaint are denied;

8.

The allegations of Article 8 of the complaint are denied, except that the defendant admits the right of the plaintiff to have the compensation order of the Deputy Commissioner reviewed in accordance with applicable provisions of law;

9.

The allegations of Article 9 of the complaint are denied.

NOW, FURTHER ANSWERING THE COMPLAINT HEREIN FILED, DEFENDANT, MINUS AIZEN, RESPECTFULLY FURTHER AVERS AND ALLEGES THAT:

10.

Defendant repeats, realleges and reavers, with the same force and effect as though it were repeated herein in toto and in extenso, each and every allegation of fact contained in the stipulation of facts included in the record before the Honorable Deputy Compensation Commissioner, Seventh Compensation District, in the case entitled "In the Matter of the Claim for Compensation under the Longshoremen's & Harbor Workers' Compensation Act, on account of claim of Minus Aizen, Employee, versus Avondale Marine
9 Ways, Inc., Employer, Self-Insured", bearing the case No. 434-328, certified copy of which has been ordered filed in the record of this cause by this Honorable Court on February 8, 1960;

11.

The compensation order and award of the Deputy Commissioner filed on the 27th day of January, 1960, is valid, lawful and in accordance with the provisions of the Longshoremen's & Harbor Workers' Compensation Act.

WHEREFORE, defendant, Minus Aizen, prays that, after due proceedings had, there be judgment herein in his favor and against the plaintiff, affirming the said compensation order and award of the Deputy Commissioner filed on the 27th day of January, 1960, and dismissing these proceedings at plaintiff's cost; and defendant further prays for all such other and further general and equitable relief as to this Honorable Court may seem just in the premises.

RAYMOND H. KIERR
SAMUEL C. GAINSBURGH
By: /s/ Samuel C. Gainsburgh
Attorneys for Defendant,
Minus Aizen
1746 National Bank of Com. Bldg.
New Orleans 12, Louisiana

IN THE UNITED STATES DISTRICT COURT

Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted—Filed April 7, 1960

The defendant P. J. Donovan, by Assistant United
10 States Attorney Francis G. Weller, hereby moves the court to dismiss plaintiff's complaint for failure to state a claim upon which relief can be granted, in support of which defendant relies on the pleadings and documents filed heretofore in this case, including the transcript of the hearing before the deputy commissioner, the exhibits attached thereto and the compensation order and award.

/s/ FRANCIS G. WELLER
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT

Motion of Defendant, Minus Aizen, for a Summary Judgment—Filed April 18, 1960

NOW INTO COURT, through his undersigned counsel, COMES MINUS AIZEN, a defendant herein, and

ON SUGGESTING TO THE COURT THAT:

1. A reference to this record will disclose that there is no dispute concerning any material fact, all of which such facts were and are the subject of a stipulation entered into between Mover and the Plaintiff, now a part of the record in this cause; and

2. The only questions presented herein are of law;

MOVES THIS HONORABLE COURT, upon the basis of the pleadings, exhibits and stipulations presently comprising the record in this cause, FOR A SUMMARY JUDGMENT DISMISSING THE PLAINTIFF'S ACTION AT ITS COST.

Respectfully submitted,

RAYMOND H. KIERR
SAMUEL C. GAINSBURGH
BY: /s/ SAMUEL C. GAINSBURGH
Samuel C. Gainsburgh
1746 National Bank of Comm. Bldg.
New Orleans 12, La.
Attorneys for Defendant,
Minus Aizen

IN THE UNITED STATES DISTRICT COURT

Plaintiff's Motion for Summary Judgment Under Rule 56—Filed April 28, 1960

Plaintiff, Avondale Marine Ways, Inc. moves the court for a summary judgment under Rule 56 in its favor on the ground as more fully set out in the petition that defendant P. J. Donovan, Deputy Commissioner, has no jurisdiction over the claim and on the ground that defendant Minus Aizen had elected to receive benefits under the Louisiana Workmen's Compensation Statute and is barred from pro-

ceeding under the Longshoremen's and Harbor Workers' Compensation Act; and on the further ground that a construction of the Longshoremen's Act to cover Aizen's claim would render it unconstitutional.

Mover further avers that there is no material issue of fact unresolved in this case inasmuch as the matter was submitted to the Deputy Commissioner upon a stipula-
12 tion of fact which forms a part of the record filed by the said Commissioner herein in response to an order of this Honorable Court.

/s/ Charles Kohlmeyer, Jr.
Charles Kohlmeyer, Jr.

/s/ H. Martin Hunley, Jr.
H. Martin Hunley, Jr.
1836 National Bank of Commerce
New Orleans 12, Louisiana
Attorneys for Plaintiff
Avondale Marine Ways, Inc.

Lemle & Kelleher
Of Counsel

U. S. DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION

Proceedings Before the Deputy Commissioner of the Seventh Compensation District of the U. S. Department of Labor, Bureau of Employees' Compensation—Case No. 434-328—Filed March 11, 1960

CERTIFICATE

This is to certify that the attached proceeding before the Deputy Commissioner of the Seventh Compensation District of the U. S. Department of Labor, Bureau of Employees' Compensation, in the matter of:

Name of Proceeding: Minus Aizen, Claimant;
against Avondale Marine Ways, Inc., Employer,
13 Self-Insurer
Case No.: 434-328 Place: New Orleans, Louisiana
Date: October 23, 1959

was held as therein appears and that this is the original transcript thereof for the files of the U. S. Department of Labor.

ACE REPORTING COMPANY

Official Reporters

By: /s/ CARL A. HUDSON
Carl A. Hudson

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14 U. S. DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act.

Case No. 434-328

MAXUS AIZEN, *Claimant*

vs.

AVONDALE MARINE WAYS, INC., *Employer*
SELF-INSURER, *Carrier*

Pursuant to notice, this matter was heard before the Hon. P. J. Donovan, Deputy Commissioner for the Seventh Compensation District, in Room 311a, Masonic Temple Building, 333 St. Charles Avenue, New Orleans, Louisiana, on Friday, October 23, 1959, commencing at 10:00 a.m.

APPEARANCES:

For the Claimant:
Samuel C. Gainsburgh, 1746 Nat'l Bank of Commerce Bldg., New Orleans 12, Louisiana.

For the Respondents:
H. Martin Hunley, Jr., 1836 Nat'l Bank of Commerce Bldg., New Orleans, Louisiana.
Charles Kohlmeyer, Jr., 1836 Nat'l Bank of Commerce Bldg., New Orleans, Louisiana.

PROCEEDINGS

The Deputy Commissioner Donovan: Let the record show that this hearing began at 10:00 a.m., Friday, October 23, 1959, and is being conducted in Room 313a, Masonic Temple Building, 333 St. Charles Avenue, New Orleans, Louisiana, which is the headquarters office of the Seventh District Bureau of Employees' Compensation, U. S. Department of Labor. The hearing at this time is being held at the request of the Claimant, Minus Aizen, 601 Magnolia Street, Thibodaux, Louisiana. The Employer, a self-insured employer, under Longshoremen's and Harbor Worker's Act is Avondale Marine Ways, Inc., P. O. Box 1030, New Orleans 8, Louisiana. The claimant is not present in person at this hearing.

Mr. Gainsburgh: He is.

16 The Deputy Commissioner: He is. Correction. The Claimant is present in person at this hearing and is represented by attorney Samuel C. Gainsburgh of the law offices of Raymond H. Kierr, National Bank of Commerce Building, New Orleans, Louisiana. Attorney Falgout, 205 W. 5th Street, Thibodaux, Louisiana, is associate counsel with the law offices of Mr. Kierr.

The Employer is represented at this hearing by attornies H. Martin Hunley and Charles Kohlmeyer, Jr. of the law office of Lemle and Kelleher, National Bank of Commerce Building, New Orleans, Louisiana.

The informal file before the Deputy Commissioner shows that on November 13, 1958, the Claimant filed formal claim with the Deputy Commissioner, claiming benefits under the Longshoremen's and Harbor Worker's Compensation Act because of injuries sustained August 11, 1956, while in the employe of Avondale Marine Ways, Inc. At that time the employer had not reported the injury to the Deputy Commissioner and, at the request of the Deputy Commissioner, the employer then presented all information available to them. Subsequently, informal discussion were conducted in the office of the Deputy Commissioner, after which the parties agreed to stipulate to the facts. It appears unnecessary for the Deputy Commissioner to engage in any detailed recitation of the facts in connection with the case, because such facts are well defined in the stipula-

tion, which is to be entered into evidence. Various
17 exhibits referred to in the stipulation will also be entered in evidence, with the possible exception of the various medical reports referred to therein. I state this possible exception because the stipulation itself indicates that parties are in agreement, that as a result of the injury, the claimant is permanently and totally disabled. However, if either of the parties desire that such medical reports be made a part of this record, I shall interpose no objection.

On the basis of earlier informal discussions, and on the basis of stipulation of facts, it is my understanding that the only issue at this time is whether the claim should properly come within the jurisdiction of this office, in the administration of the Longshoremen's and Harbor Workers' Compensation Act, or whether the case properly belongs under the State of Louisiana Compensation Act. However, in order that the parties may fully state their respective positions, I now ask Attorney Gainsburgh to briefly state the claim, with the understanding, of course, that the stipulation as well as various other documents are to be admitted into the record. Mr. Gainsburgh, will you now state the claim?

Mr. Gainsburgh: Mr. Commissioner, may I ask whether it was your intention that I should enter in the case at this time the documents into the record, or simply state the nature of our claim, for the purposes of the record.

18 The Deputy Commissioner: I believe you should state the claim prior to the introduction.

Mr. Gainsburgh: This is a claim by Minus Aizen for compensation benefits as a result of permanently and totally disabling injuries which he sustained on August 11, 1956, while employed as a welder by the employer in this matter. At the time of his injuries, the claimant was aboard a barge, which was afloat in waters of the Mississippi River, in or adjacent to the Greater New Orleans Area, Louisiana. The employer in this case, Avondale Marine Ways, Inc., employs persons engaged in repairs, engaged in construction and in repairs, of vessels. This claim is based upon the contentions that the claimant on August 11, 1956, while in the course and scope of his said employment as a welder and while aboard a vessel afloat in navigable waters of the

United States, sustained the aforementioned and character of injuries which for he is entitled to be paid under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. That is essentially the statement of our claims, sir.

The Deputy Commissioner: Mr. Hunley, will you please state for the record the basis on which you resist the claim?

19 Mr. Hunley: The Claimant was employed by Avondale on August 11, 1956, when he was injured. On that date, he was injured while working on an uncompleted drilling barge, which was, at that time, moored in a float in the Mississippi River. This barge was being constructed by Avondale while under the private contract of an ultimate purchaser, and had been partially constructed on Avondale's Ways adjoining the Mississippi River. It had been launched in an uncompleted state on July 26, 1956, towed by an independent contractor about 200 feet from the Ways and within the confines of the Avondale plant, and there moored for completion. The claimant at the time of his injury was employed as a welder, and had been so employed by Avondale on and off since July 2 of 1952. He actually worked until January 7, 1953, and then came back to work for Avondale on December 12, 1955, and worked continuously until his injury of August 11, 1956. The claimant had worked solely on new construction, and had performed no work on repair jobs on completed vessels. All the work which he had performed for Avondale was performed on land with the exception of the work being done when he sustained the injuries on August 11, 1956.

Following his injury, Avondale commenced the payment to the claimant of $35 a week, the maximum amount of compensation allowable under the Louisiana State Workmen's Compensation Act. Since the date of his injury and up to the present date, he has been paid this $35 a week by checks, which clearly show on their face

20 that they represent payments under the Louisiana State Compensation law. No deductions for social security, unemployment or withholding taxes were made. In addition to the weekly benefits paid under the State's Compensation Statute, Avondale also paid from the date

of the injury to the present date approximately $7,000 in doctors, hospital and other medical expenses for the account of the claimant. In addition to that, those amounts paid in compensation and for medical expenses, Avondale, upon a plead of financial hardship by the claimant, advanced to him the sum of $3,830 by checks from the time of his injury until the date this stipulation was filed. The checks were clearly marked "Advance on Compensation" and was subject to no deductions of any kind. The vessel on which the claimant was working at the time of his injury was completed and delivered to the purchaser on November 17, 1956, and at the time of his injury, the barge was 57 percent completed, both in man hours and in dollar volume.

The position of the employer in this case is that the Commissioner has no jurisdiction over this claim, inasmuch as the claim comes under the Louisiana Workmen's Compensation statute, which is already being observed by the employer, and does not come under the Longshoremen's and Harbor Workers' Act. The ground for this contention is that the claimant was, at the time of his injury, working on new construction, a barge 57 percent complete. Hence the claim is not compensible under the Longshore-
21 men's Act. An alternative contention is made by the employer that Aizen has elected to come under the state act by accepting workmen's compensation payments, medical expenses, and advances thereon for two years approximately before the claim was filed with the Commissioner.

In the event we were found responsible under the Act, we would anticipate that credit be given Avondale Marine Ways for all amounts paid the claimant as afore-said under this compensation statute.

Mr. Gainsburgh: Mr. Commissioner, may I reply to that portion of the employers defense which was not directly adverse to our statement of the case, that is, with respect to election and prescription?

The Deputy Commissioner: I have heard no issues in respect to prescription.

Mr. Hunley: No, just the election.

Mr. Gainsburgh: I would amend that request, sir, for permission to state our position with respect to election.

The Deputy Commissioner: I believe that would be entering the field of argument, don't you, Mr. Gainsburgh?

22 Mr. Gainsburgh: I withdraw the question.

The Deputy Commissioner: Before proceeding to submit documents in evidence, Mr. Hunley does the approximately $7,000 paid by the employer for medical and other services include all medical and hospital treatment and care that has been required by the claimant to date?

Mr. Hunley: It included that hospital and medical care up to the date of the filing of the stipulation. I don't believe, as far as I know, that there has been none since that date, paid by Avondale. You might ask the claimant.

The Deputy Commissioner: In other words, it is your understanding that the employer has provided all necessary medical and hospital treatment and care up to the date?

Mr. Hunley: That is correct. That is our contention.

The Deputy Commissioner: I have one other question. In respect to the advance of $3,830 or advances, do you know the total amount of compensation paid by the employer, including that $3,830?

Mr. Hunley: I don't know the exact figure, but it would be $35 per week from the date of the accident to the present time.

23 The Deputy Commissigner: In the event that we should make an award under this Act we shall then ask Mr. Ewing Moore to give us that figure.

Mr. Hunley: That can be furnished and there will be no dispute about that.

The Deputy Commissioner: All right. We are prepared to receive evidence in behalf of the claimant. Mr. Gainsburgh? I hand you the original form, claim form, U. S. 203 filed by the claimant with this office November 13, 1958, and a copy of that has been prepared by this office. Will you observe it and then refer it to Mr. Hunley and Mr. Kohlmeyer for their observation? I would like to have that claim as a part of the record. It should be a claimant's exhibit.

Mr. Gainsburgh: On behalf of claimant's counsel for the claimant, offers and introduce and file in evidence form 203, Employees claim for compensation, with the request that it be marked Claimant No. 1 for Identification.

The Deputy Commissioner: Mr. Hunley and Mr. Kohlmeyer, you have observed the Claimant No. 1 and have no objection?

Mr. Hunley: We have no objection.

24 The Deputy Commissioner: Upon request of counsel for claimant, and by agreement of counsel for the respondent, it is admitted in evidence, identified as claimant's exhibit No. 1, the bureau standard form 203, executed by the claimant on November 7, 1958, and received in the office of the deputy commissioner on November 13, 1958.

(The document in question was received in evidence and was marked Claimant's Exhibit No. 1.)

The Deputy Commissioner: Mr. Hunley and Mr. Kohlmeyer, I show you form U.S. 215, which is the employers answer to the claim, the original and a copy prepared by this office, and after you observe that, will you please refer it to Mr. Gainsburgh for observation.

Mr. Hunley: I offer that document, being answer of the employer, marked Avondale 1.

The Deputy Commissioner: Are you in agreement, Mr. Gainsburgh?

Mr. Gainsburgh: We have no objection to the offer of that document.

The Deputy Commissioner: At the request of counsel for the respondent and without objection on the part of counsel for the claimant, there is admitted in evi-

25 dence, identified as Respondent's Exhibit A the bureau standard form US 215, "Answer of employer of insurance carrier to employees' claim for compensation."

(The document in question was received in evidence and was marked Respondent's Exhibit A.)

The Deputy Commissioner: Mr. Hunley and Mr. Kohlmeyer, this is a letter dated November 29, 1958, addressed to this office by Mr. Ewing Moore, Insurance Director for the Employer, with attached employers report on bureau standard form US 202, and I also hand you a report dated December 31, 1958, which is a job status report as of August 11, 1956, prepared by Mr. Ferguson of the Cost

Analysis branch. Will you please observe them and then refer them to Mr. Gainsburgh for his observation?

Mr. Hunley: This job status report that you refer to is a status report on the barge on which the claimant was working at the time he was injured.

The Deputy Commissioner: That is correct.

Mr. Hunley: I would like to offer the letter of Mr. Moore referred to, dated November 29, 1958, to the U. S. Department of Labor, New Orleans, marked Respondent's B, the attached form US 202, executed by Mr. Ewing Moore,
26 marked Respondent's C, and the report on status of the job as of August 11, 1956, by C. W. Ferguson at Avondale Marine Ways marked Respondent's D.

Mr. Gainsburgh: May I be allowed to go off the record for just a moment?

The Deputy Commissioner: Yes.

(Discussion off the record.)

The Deputy Commissioner: On the record. Do you have any objection?

Mr. Gainsburgh: The only objection I would care to make, sir, would be to the materiality of this analysis statement or the relevancy of it, in view of the stipulation, because it just contains the same information.

The Deputy Commissioner: That is correct. It contains practically the same information. However, there are certain other evidence that is being admitted in here that is also contained in the stipulation. My suggestion for admitting those various documents is to have this record as complete as possible, and in the event that is might become necessary for any future reviews, the reviewing authorities should have as complete a picture as possible.

27 Mr. Hunley: I would simply like to point out that this exhibit is the status of work and is part of the stipulation, paragraph 7.

The Deputy Commissioner: That is correct.

Mr. Gainsburgh: Along those lines, the first paragraph of the stipulation provides that it is stipulated and agreed reserving the right for each party to object to any of the stipulations made here and after on the grounds of rele-

vancy, materiality or admissibility. So, my objection would be within that reservation. But, in view of the Commissioner's statement, I will withdraw the objection.

The Deputy Commissioner: All right. At request for counsel for the Respondent and without objection on the part of counsel for the claimant, there is admitted into evidence identified as Respondent's B, a letter dated November 29, 1958, addressed to the Deputy Commissioner by Mr. Ewing V. Moore, Insurance Director for the Employer. Under the same conditions there is admitted as Respondent's Exhibit No. C, standard form US 202, employers first report of injury, which was submitted to the bureau with the employer's letter of November 29, 1958, and at the request of the Deputy Commissioner.

28 Under these same conditions, there is admitted in evidence, identified as Respondent's Exhibit D, a job status report as of August 11, 1956. This report is dated December 31, 1958, and prepared by C. W. Ferguson, Cost Analysis Branch, Production Department of the Employer, and is understood to be a job status report covering the status of the drilling barge on which the claimant was engaged at the time of the injury.

(The documents in question were received in evidence and marked Respondent's Exhibit No. B, Respondent's Exhibit No. C and Respondent's Exhibit No. D respectively.)

The Deputy Commissioner: Mr. Hunley and Mr. Kohlmeyer, I show you a letter dated November 17, 1958, addressed to the Employer by the Deputy Commissioner requesting that the employer submit a report to this office, and it was in response to this particular letter that Mr. Ewing Moore addressed his letter of November 29, 1958, to this office, with the employers report on form US 202. I propose to admit that letter of November 17, 1958, as Deputy Commissioner's Exhibit, if there are no objections.

Mr. Gainsburgh: None by the claimant.

Mr. Hunley: No objections.

The Deputy Commissioner: Counsel for the parties have observed the letter dated November 17, 1958,

29 addressed to the employer by the Deputy Commissioner, and indicating no objection, this document is

admitted into evidence, identified as Deputy Commissioner's Exhibit No. 1.

(The document in question was received in evidence and marked Deputy Commissioner's Exhibit No. 1.)

The Deputy Commissioner: I hand to counsel for the parties an undated stipulation of 4 pages which was received in the office of the Deputy Commissioner on April 16, 1959. It is my understanding that counsel for the parties are in agreement to have this stipulation admitted into evidence. Is that correct, Mr. Gainsburgh?

Mr. Gainsburgh: That is correct, Mr. Commissioner.

Mr. Hunley: Yes.

The Deputy Commissioner: By agreement of the parties, there is admitted into evidence identified as Deputy Commissioner's Exhibit No. 2 an undated stipulation of four pages executed by attorney Charles Kohlmeyer, Jr., and attorney H. Martin Hunley, Jr., of the law offices of Lemle and Kelleher, on behalf of the employer, and executed by Samuel Gainsburgh, attorney of the law offices of Raymond Kierr, on behalf of the Claimant.

30 (The document in question was received in evidence and was marked Deputy Commissioner's Exhibit No. 2.)

The Deputy Commissioner: Mr. Hunley, in order that—

Mr. Hunley: All of these documents are admitted, of course, subject to my intention made at the beginning, that the Commissioner does not have jurisdiction over this claim.

The Deputy Commissioner: I understand that to be your position, yes. Mr. Hunley, in stating that the employer had made advance payments of $3,830 to the Claimant, it is my understanding that those advances of $3,830 are in addition to regular weekly payments of the $35 per week, is that correct?

Mr. Hunley: That is correct.

The Deputy Commissioner: Mr. Gainsburgh, do you have any further evidence to submit in this case?

Mr. Gainsburgh: Mr. Commissioner, we have no further factual evidence to submit.

The Deputy Commissioner: Mr. Hunley, does the employer have any further evidence to submit?

31 Mr. Hunley: No, no, we do not.

The Deputy Commissioner: I would understand, then, that both parties rest. Mr. Gainsburgh, you are in agreement, are you not.

Mr. Gainsburgh: I am.

The Deputy Commissioner: You are, Mr. Hunley?

Mr. Hunley: Yes.

The Deputy Commissioner: The record will show that this hearing is closed at 10:45 a.m., October 23, 1959. The decision is reserved.

(Thereupon the instant hearing was closed.)

Claimant's #1

Form US-203

Received
Nov. 13, 1958
District No. 7

U. S. DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION

Office of Deputy Commissioner 311 Masonic Temple Bldg., New Orleans 12, La.

Administering Longshoremen's and Harbor Workers' Compensation Act.

Case No. 434-328
Insurance
Carrier's No. 1207

32 EMPLOYEE'S CLAIM FOR COMPENSATION

(To be filed with the Deputy Commissioner in accordance with Sections 13 and 19 of the law)

1. Name of employee Minus Aizen
Employee's Check No. .....

2. Address: Street and No. 601 Magnolia
City or town Thibodaux, La.

INJURED PERSON

3. Sex Male Age 25 Married, single, widowed married

4. Do you speak English? Yes
Nationality American

5. State regular occupation Assistant Welder

6. What were you doing when injured? Pulling come-along to place steel in proper place to weld.

7. (a) Wages or average earnings per day, $14.88 (Include overtime, board, rent, and other allowances.) (b) Per week, $89.28 (c) Were you employed elsewhere during week in which you were injured? No. (d) If so, state where and when .....

8. Were you paid full wages for day of accident? Not known

---

9. Employer Avondale Marine Ways, Inc.

EMPLOYER

10. Office address: Street and No. P. O. Box 1030
City or town New Orleans 8, La.

11. Nature of business Shipbuilding and repair.

---

12. Place where injury occurred Avondale Marine Ways, on barge floating on Mississippi River.

THE INJURY

13. Name of foreman Harry Riddles

14. Date of accident or first illness, the 11th day of Aug., 1956, at 10:00 o'clock A.M.

15. How did accident happen or how was occupational disease caused? Eye-lug welded to pipe which I was placing on barge in proper

33

position with come-along broke causing piece of steel to hit me in the head knocking me off scaffle onto floor of barge and then into the Mississippi River.

16. State fully nature of injury or occupational disease: Multiple fracture of skull, broken left wrist, left arm, and left hip.

17. On what date did you stop work because of injury? August 11, 1956.

18. Have you returned to work? (Yes or No) No If "yes", on what date? ....., 195.....

NATURE AND EXTENT OF INJURY

19. Does injury keep you from work? (Yes or No) Yes

20. Have you done any work in period of disability? No

21. Have you received any wages since injury? No. If so, from and to what date? .....

22. Has injury resulted in amputation? No. If so, describe same .....

23. Did you request your employer to provide medical attendance? Yes. Has he done so? Yes

24. Attending physician: Name D. J. Farley Address New Orleans, La.

25. Hospital: Name So. Baptist Hospital Address New Orleans, Louisiana

26. Have you given your employer notice of injury? (Yes or No) No When? ....., 195.....

NOTICE

27. If such notice was given, to whom? Employer had notice at time of injury.

28. Was it given orally or in writing? Notice obtained from knowledge of other employees.

34 I hereby present my claim to the Deputy Commissioner for compensation for disability resulting from an injury arising out of and in the course of my employment and not occasioned solely by intoxication, or by my willful intention, and in support of it I make the foregoing statement of facts.

Signed by /s/ MIXUS AIZEN
Claimant
Mail address 601 Magnolia St.,
Thibodaux

Dated November 7, 1958

Respondent's Exhibit A

Form US-215

U. S. DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION

Office of Deputy Commissioner 311 Masonic Temple Bldg., N. O., La.

Administering Longshoremen's and Harbor Workers' Compensation Act.

Received Dec. 1, 1958 Case No. 434-328
District No. 7. Insurance Carrier's No. .....

ANSWER OF EMPLOYER OR INSURANCE CARRIER TO EMPLOYEE'S CLAIM FOR COMPENSATION

MIXUS AIZEN, *Claimant*

vs.

AVONDALE MARINE WAYS, INC., *Employer*
Self-Insured, Insurance Carrier

35 The employer or insurance carrier above named for answer to the claim respectfully shows:

1. It is admitted that applicant sustained an injury on or about the date set forth in the application.

2. It is denied that both the employer and employee were subject to the Longshoremen's and Harbor Workers' Compensation Act at the time of the alleged injury.

3. It is admitted that the relationship of employer and employee existed at the time of the injury.

4. It is admitted that at the time of the alleged injury the employee was performing service growing out of and incidental to his employment.

5. It is admitted that notice of injury was given employer as specified in application.

6. It is admitted that applicant was permanently disabled to the extent stated in application.

7. It is admitted that applicant was temporarily disabled for the period stated in application.

8. It is admitted that the rate of wages as set forth in application is correct.

9. .....

AVONDALE MARINE WAYS, INC.
Signed /s/ EWING V. MOORE
Insurance Director

Note:—The employer or insurance carrier should
36 answer the claim within ten days from the date that a copy of it is served upon him. The original answer should be mailed to the deputy commissioner at the above address and a copy thereof served upon the claimant either personally or by mailing to the address in the claim.

Respondent's Exhibit B

Received
Dec. 1, 1958
District No. 7

AVONDALE MARINE WAYS, INC.
P. O. Box 1030
New Orleans, Louisiana

November 29, 1958

U. S. Department of Labor
Bureau of Employees Compensation
Masonic Temple Building
New Orleans, Louisiana

Attention: Mr. P. J. Donovan
Deputy Commissioner

Re: Minus Aizen, employee
Injured: August 11, 1956
Your File No. 434-328

Gentlemen:

This will acknowledge your letter of November 17, 1958 regarding the above case.

We are returning herewith Form US-202, Employer's First Report of Injury. You mention in your letter that the submission of this form does not necessarily indicate your office has jurisdiction, and it is being submitted on that basis.

Also attached is original copy of Form US-215, Answer to Employee's Claim. You will note in our answer to Items 6 and 7 on Form US-215 that we have admitted the allegations regarding disability. Inasmuch as we agree Mr.
37 Aizen is now totally disabled, we are not sending you any of the medical reports at this time.

As you requested, copies of the information given you is being sent to the Law Offices of Raymond H. Kierr, 1746

National Bank of Commerce Building, New Orleans 12, Louisiana.

We shall await further word from you on the matter.

Very truly yours,

AVONDALE MARINE WAYS, INC.
/s/ EWING V. MOORE
Ewing V. Moore
Insurance Director

EVM:dl
cc: Attorney Samuel C. Gainsburgh
Law Offices of Raymond H. Kierr

Respondent's Exhibit C

Received
Dec. 1, 1958
District No. 7

AVONDALE MARINE WAYS, INC.
INSURANCE DEPARTMENT
WESTWEGO, LA.

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION

Office of Deputy Commissioner New Orleans, Louisiana

Administering Longshoremen's and Harbor Workers' Compensation Act.

EMPLOYER's FIRST REPORT TO DEPUTY COMMISSIONER OF ACCIDENT OR OCCUPATION DISEASE

(To be submitted in duplicate to Deputy Commissioner who will forward copy to Commission)

EMPLOYER

1. Employer's name Avondale Marine Ways, Inc.
2. Office address Avondale, Louisiana
3. Nature of business Marine Construction and Repair
4. Insurance carrier Self

82

38

6. Full name of injured person Minus Aizen Check No. 1269

7. Address: Street and No. 601 Magnolia St. City or town Thibodeaux, La.

8. Sex Male Age 25 Speak English Yes If not, what language .....

INJURED PERSON

9. Injured person's regular occupation Tack Welder

10. Was he injured in regular occupation? Yes If not occupation when injured .....

11. Wages or average earnings per day $16.24 per week $..... (Include overtime, bonuses, etc.)

12. Working days per week 5½ Any other advantage? .....

13. Length of service in occupation 5 yrs. Were full wages paid for day of injury .....

14. Place where injury occurred Delta Drilling Barge (Give place and name of vessel)

15. Name of foreman Emile Foret

16. Date of accident or first illness 8 11 56 Last day worked 8 11 56
(month, day, year)

THE INJURY

17. When did you or your foreman first have knowledge of injury? Immediately

18. Describe in full how alleged accident occurred, or how employee was exposed to alleged hazard: Was placing eye-lug welded to pipe on barge in proper place with come-along which broke causing piece of steel to hit him in the head knocking him off scaffold onto barge below and into the river.

19. Machine, too, or thing in connection with which accident or disease occurred .....
(If machine indicate part)

39

20. Nature of injury or occupational disease Fractured skull, brain damage, fractured right forearm, general body contusions

21. Was member or part of member lost? No

22. Will injury probably result in serious head or facial disfigurement? No

NATURE AND EXTENT OF INJURY

23. Did injury cause of loss of time? Yes
If "yes" on what date? 8 11 56

24. Has injured person returned to work? No
If "yes" on what date? .....

25. Did you provide or authorize medical attention? Yes When? Immediately

26. Physician Dr. D. J. Farley, Pere Marquette Building, New Orleans, La.
Dr. Howard H. Karr, 1520 Louisiana Ave., N.O., La.

27. Hospital Baptist Hospital

Firm Name AVONDALE MARINE WAYS, INC.

Signed EWING V. MOORE
Insurance Director

Unless the above report shows that the injured is no longer disabled, then a supplementary report on "Employer's Supplementary Report of Injury" Form (US-211) must be made at the termination of disability, or at the end of fifteen days if disability has not then ended.

Respondent's Exhibit D

Job 8702
Elevated Deck Drilling Barge
Delta Offshore Drilling Co.

Received
Apr. 16, 1959
District No. 7

Status of Job 8-11-56 December 31, 1958

40	Spending Thru	Final Total	% Complete
	8-11-56	12-4-56	8-11-56
Engineering	3,322.0 MH	4,123.0 MH	80.6%
Moldloft	567.0	567.0	100.0%
Prod. Engr.	683.0	1,126.0	60.7%
Cranes	5,053.0	7,953.0	63.5%
Hull	18,049.0	18,301.0	98.6%
Bow Wedge	1,672.0	3,343.0	50.0%
Pontoons	3,716.0	3,716.0	100.0%
Rams, Columns & Braces	3,733.0	3,776.0	98.9%
Superstructure	8,789.0	14,288.0	61.5%
Piping	5,762.0	13,638.0	42.2%
Machinery	1,158.0	4,794.0	24.2%
Electrical	614.0	6,904.0	8.9%
Sheetmetal	2,486.0	4,720.0	52.7%
Joiner	0	2,319.0	0
Insulation	74.0	1,009.0	7.3%
Fittings	5,682.0	13,916.0	40.8%
Clean & Paint	2,772.0	5,133.0	54.0%
General	9,173.0	18,169.0	50.0%
Outfitting	90.0	1,239.0	7.3%
Jigs	338.0	741.0	45.6%
Errors	737.0	2,531.0	29.1%
Purchasable Items	5,716.0	6,593.0	89.8%
Extras	2,781.0	6,329.0	43.9%
TOTAL MANHOURS	82,967.0 MH	145,228.0 MH	57.1%
TOTAL DOLLARS	$195,443.00	$341,880.00	57.2%

CONSTRUCTION CHRONOLOGY

Keel Laid	4-16-56
Launched	7-26-56
Delivered	11-17-56

/s/ C. W. FERGUSON
C. W. Ferguson
Cost Analysis Branch
Production Department

CWF/rt

EXHIBIT "C"

Deputy Commissioner's Exhibit #1 Attached to Foregoing Proceedings

UNITED STATES DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION
LONGSHOREMEN'S AND HARBOR WORKERS'
COMPENSATION ACT
SEVENTH COMPENSATION DISTRICT
311 MASONIC TEMPLE BUILDING, 333 ST. CHARLES AVE.
NEW ORLEANS 12, LA.

Refer to File No.
434-328

November 17, 1958

Avondale Marine Ways, Inc.
P. O. Box 1030
New Orleans, La.

Re: Minus Aizen, employee
Injured: August 11, 1956

Gentlemen:

Please refer to my letter of October 17, 1958 and your reply dated October 22, 1958 relative to the caise of Minus Aizen, injured August 11, 1956, while in your employ.

Enclosed please find copy of Form US-203 executed by the employee on November 7, 1958 and received in this office November 13, 1958. There are also enclosed blank forms US-215 on which you may prepare your reply to this claim, returning the original to this office and a copy to the employee.

Inasmuch as the employee has filed claim under this Act, please submit the Form US-202, Employer's First Report of Injury. As you are aware, the transmittal of Form US-202 is not in itself an acknowledgement of jurisdiction by this office. It is also requested that you furnish us a copy of all the medical reports received by you to date.

For your information, the employee is represented by the Law Offices of Raymond H. Kierr, 1746 National Bank of Commerce Building, New Orleans 12, Louisiana, and Mr. Kierr's office should be furnished a copy of all information submitted to this office.

After we have received the above requested information, an informal conference will be scheduled.

Very truly yours,

/s/ P. J. Donovan
P. J. Donovan
Deputy Commissioner

PJD mas
cc: Attorney Samuel C. Gainsburgh,
Law Offices of Raymond H. Kierr
1746 National Bank of Com. Bldg.
New Orleans 12, Louisiana

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42 **Deputy Commissioner's Exhibit #2**

Received
Apr 16, 1959
District No. 7

BUREAU OF EMPLOYEES' COMPENSATION
SEVENTH COMPENSATION DISTRICT

Case No. 434-328

In the Matter of the Claim for Compensation under the Longshoremen's & Harbor Workers' Compensation Act

Minus Aizen, *Claimant*

versus

Avondale Marine Ways, Inc.
Employer (Self-insured)

STIPULATION OF FACT

It is hereby stipulated and agreed by and between the claimant, Minus Aizen (hereinafter referred to as "Aizen") and Avondale Marine Ways, Inc., a Louisiana corporation having its principal offices at Avondale, Louisiana (hereinafter referred to as "Avondale"), reserving unto each party the right to object to any of the stipulations hereinafter made on the grounds of relevancy, materiality and admissibility, that:

1.

Avondale owns and operates two shipyards in the vicinity of New Orleans, Louisiana. The first of the yards is at Avondale, Louisiana, where a majority of the business performed is fabrication of machinery and structural steel and the new construction of vessels. Repair work on
43 vessels is also performed at this yard, which is situated on the Missippissi River and has launching ways leading into the river. The other yard owned and operated by Avondale is situated at Harvey, Louisiana. At the latter yard repair work on vessels is the principal work performed.

Avondale employs approximately two thousand employees engaged in manual labor and approximately five hundred in administrative, engineering and supervisory functions.

2.

Aizen was first employed by Avondale on July 2, 1952. He was separated on January 7, 1953. He went back to work for Avondale on December 12, 1955 and worked continuously until August 11, 1956 when he sustained the injuries hereinafter described. During the entire term of his employments by Avondale he worked as a tack welder.

3.

During the entire term of Aizen's employment by Avondale, he worked solely on new construction, that is construction of new watercraft, and performed no work on repair jobs. All work performed by Aizen was performed on land with the exception of the work being performed when he sustained the injuries hereinafter referred to.

4.

Notwithstanding that Aizen worked solely on new construction and performed no work on repair jobs,
44 other workmen in particular crafts assigned to work on repair of vessels did on rare occasions perform work on new construction of vessels when there was no work for them to do on repair of vessels and when their services were needed on new construction. In these cases, as soon as the services of the particular workmen were

needed on repair of vessels, or as soon as the need for their services was terminated on new construction, they returned to work on repair of vessels. The same is true for warkmen engaged in new construction of vessels to a lesser degree because new construction is susceptible of being planned more than and fluctuates less than repair work.

5.

On or about April 16, 1956, Avondale commenced the construction of an elevated deck drilling barge under a fixed price contract, which had been negotiated sometime prior thereto with Delta Offshore Drilling Company. The keel on the barge was laid on April 16, 1956. It was launched in an uncompleted state on July 26, 1956. Immediately after the launching it was towed by tugs not owned, operated or controlled by Avondale, but owned, operated and controlled by an independent contractor to a fitting dock approximately two hundred feet from the launching ways and within the confines of the Avondale plant for completion. The barge was completed on November 17, 1956 and was delivered on that date to its owners by Avondale.

6.

The barge described above was a non-self-propelled submersible drilling barge intended for use in offshore oil operations and at the time of Aizen's injuries, was lying afloat at the fitting dock of Avondale's plant at Avondale on the navigable waters of the United States, to-wit, the Mississippi River.

7.

On August 11, 1956 the construction of the barge was completed to the extent of fifty-seven per cent, both in man hours expended and to be expended, and in dollar value expended and to be expended, all as will appear by reference to the exhibit annexed hereto dated December 31, 1958 and prepared by C. W. Ferguson of Avondale's Cost Analysis Branch.

8.

On August 11, 1956 while Aizen was employed as a tack welder working on the completion of the drilling barge

described above, he fell from the superstructure, striking the pontoon on which the barge was floating and thence fell into the water. He sustained extensive severe and permanent and totally disabling injuries at the result of his fall. There is attached hereto as Exhibit B a summary of the injuries sustained by him, prepared by Dr. Howard Karr under date of August 11, 1956 and August 8, 1957 and by Dr. G. C. Battalora, dated April 25, 1957 and November 7, 1957.

9.

At the time that he sustained his injuries Aizen's
46 average weekly earnings were $89.32 and if entitled to any award he is entitled to the maximum weekly compensation benefits available to him under the law.

10.

Avondale had immediate notice of Aizen's injuries and forthwith commenced paying him a benefit of $35.00 per week, the maximum amount of compensation allowable under the Louisiana State Workmen's Compensation Act. Since the date of his injury and up to the present date Avondale has paid Aizen $35.00 per week by checks which clearly showed on their face that they represented compensation under the State Compensation Act. No deductions for Social Security, Unemployment, or Withholding Taxes were made from those checks.

11.

In addition to his weekly compensation benefits Avondale also has paid the approximate sum of $7,000.00 in doctors', hospital and other medical expenses for account of Aizen.

12.

In addition to the weekly compensation benefits paid to Aizen and the medical payments made for his treatment as aforesaid, Avondale has also advanced to him the amount of $3,830.00 by checks of varying amounts and at varying times since he sustained his injuries. The advances were made to Aizen at his request in order
47 to aid him because of his statement that he was in

financial difficulties. All checks were clearly marked "advance on compensation" and were subject to no deduction of any kind.

13.

Avondale filed no notice of the accident with the Deputy Compensation Commissioner until instructed to do so on November 29, 1958 when such notice was filed pursuant to written instructions from the Deputy Commissioner and a copy of the instructions is annexed hereto as Exhibit C.

14.

Avondale has qualified as a self insured under the United States Longshoremen's & Harbor Workers' Compensation Act.

/s/ Charles Kohlmeyer, Jr.
Charles Kohlmeyer, Jr.

/s/ H. Martin Hunley, Jr.
H. Martin Hunley, Jr.

Lemle & Kelleher
1836 National Bank of
Commerce Bldg.
New Orleans, Louisiana

Attorneys for Avondale Marine Ways, Inc.

/s/ Samuel Gainsburgh
Samuel Gainsburgh
1746 National Bank of
Commerce Bldg.
Attorney for Minus Aizen

48 U. S. DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION
SEVENTH COMPENSATION DISTRICT

Case No. 434-328

In the Matter of the Claim for Compensation under the Longshoremen's & Harbor Workers' Compensation Act

MINUS AIZEN, *Claimant*

vs.

AVONDALE MARINE WAYS, INC.
Self-Insured Employer

Compensation Order Award of Compensation by the Deputy Commissioner—Jan. 27, 1960

Such investigation in respect to the above entitled claim having been made as is considered necessary, as stipulation of facts having been submitted by the interested parties, and a hearing having been duly held in conformity with law the Deputy Commissioner makes the following

FINDINGS OF FACT:

That on the eleventh day of August, 1956, the claimant above named was in the employ of the employer above named, at Avondale, in the State of Louisiana, in the Seventh Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act; that the liability of the employer for compensation under the said Act was insured by itself as a self-insured employer;

That the business of the employer includes the operation of two shipyards in the vicinity of New Orleans,
49 Louisiana; that the first of the two shipyards is located at Avondale, Louisiana, where a majority of the business performed is fabrication of machinery and structural steel and the new construction of vessels; that repair work on vessels is also performed at this yard which is situated on the Mississippi River and has launching ways leading into the river; that the second of the two shipyards is situated at Harvey, Louisiana, where repair work on vessels is the principal work performed; that the em-

ployer employs approximately two thousand employees engaged in manual labor and approximately five hundred employees engaged in administrative, engineering, and supervisory functions; that the employer has a number of employees at both plants who are employed in maritime employment upon the navigable waters of the United States;

That the claimant, Minus Aizen, was first employed by the employer on July 2, 1952 and continued in such employment until January 7, 1953, on which latter date his services were terminated; that the claimant was re-employed by the employer on December 12, 1955 and continued in such employment to and including August 11, 1956, on which latter date he sustained injuries hereinafter described;

That on or about April 16, 1956, the employer commenced construction of a drilling barge for Delta Offshore Drilling Company; that the keel on the barge was laid on April 16, 1956; that the barge was launched on July 26, 1956 and immediately following the launching was towed to a fitting deck approximately two hundred feet from the launching ways, and within the confines of the Avondale plant; that the barge was completed on November 17, 1956; that the barge described above was a drilling barge, intended for use in offshore oil operations, and at the time of the claimant's injury on August 11, 1956, was lying afloat at the fitting dock of the Avondale plant, on the Mississippi River;

That on August 11, 1956, the claimant, Minus Aizen, while performing service for the employer as a tack welder aboard the barge described above, which was then afloat on navigable waters of the United States, sustained personal injury resulting in his disability when he fell from the superstructure, striuking the pontoon on which the barge was floating, and then falling into the Mississippi River, as a result of which he suffered severe multiple injuries; that the injury arose out of and in the course of the employment; that this claim comes within the jurisdiction of the Bureau of Employees' Compensation, United States Department of Labor, in the administration of the Longshoremen's and Harbor Workers' Compensation Act;

That written notice of the injury was not given to the employer within thirty days but that the employer had knowledge of the injury has not been prejudiced by the lack of written notice; that the employer furnished
51 the claimant with all medical, surgical and hospital treatment and care required to April 16, 1959, the date on which the stipulation of facts were filed with the Deputy Commissioner; that the employer is liable for all medical, surgical and hospital treatment and care required by the claimant, as a result of the injury of August 11, 1956; that the average weekly wage of the claimant at the time of the injury amounted to the sum of $89.32;

That as a result of the injury sustained on August 11, 1956, the claimant was wholly disabled beginning August 12, 1956; that such disability is permanent; that for such permanent total disability the claimant is entitled to receive compensation at the maximum rate of $54.00 per week, beginning August 12, 1956 and continuing; that accrued compensation for permanent total disability from August 12, 1956 to January 23, 1960, inclusive, 180 weeks at the rate of $54.00 per week, amounts to $9,720.00; that the employer has paid compensation to the claimant under the provisions of the State of Louisiana Compensation Act in the sum of $6,300.00 for the period August 12, 1956 to January 23, 1960, inclusive, 180 weeks at the rate of $35.00 per week, and has also made advance payments to the claimant in the sum of $3,830.00, or a total payment of $10,130.00.

Upon the foregoing findings of fact the Deputy Commissioner makes the following

AWARD

That the self-insured employer, Avondale Marine
52 Ways, Inc., Avondale, Louisiana, shall pay to the claimant, Minus Aizen, 601 Magnolia Street, Thibodaux, Louisiana, compensation for permanent total disability from August 12, 1956 to January 23, 1960, inclusive 180 weeks at the rate of $54.00 per week, in the sum of $9,720.00. The employer, having previously paid compensation to the claimant in the sum of $10,130.00, shall be entitled to credit for advance payment in the sum of $410.00 at the rate of $54.00 per week; that such advance

payment will be liquidated with payment in the sum of $6.57 on March 17, 1960, inclusive, and beginning March 18, 1960, payments shall continue for permanent total disability at the rate of $54.00 per week, payable in bi-weekly installment, subject to the limitations of the Act, or until further order of the Deputy Commissioner.

That the self-insured employer shall furnish the claimant with all medical, surgical and hospital treatment and care that may be required by the claimant as a result of the injury of August 11, 1956.

A fee for legal services rendered the claimant in connection with this case is approved in favor of Attorney Samuel C. Gainsburgh of the law offices of Raymond H. Kierr, 1746 National Bank of Commerce Building, New Orleans 12, Louisiana, in the sum of $500.00, such sum to constitute a lien upon future payments in the manner outlined below;

A fee for legal services rendered the claimant in
53 connection with this case is approved in favor of Attorney Wollen J. Falgout, 205 West Fifth Street, Thibodaux, Louisiana, in the sum of $200.00, such sum to constitute a lien upon future payments in the manner outlined below:

From each bi-weekly payment, beginning March 18, 1960, in the amount of $108.00, the sum of $10.00 shall be paid to Attorney Gainsburgh and the sum of $5.00 shall be paid to Attorney Falgout until the respective liens have been paid.

Given under my hand at New Orleans, Louisiana, this 27th day of January, 1960.

/s/ P. J. Donovan
Deputy Commissioner
Seventh Compensation District

54 IN THE UNITED STATES DISTRICT COURT

Minute Entry of Hearing on Motion of Defendant to Dismiss Complaint and on Motion of Defendant for Summary Judgment: Hearing on Motion of Plaintiff for Summary Judgment: Argument: and Submission—May 11, 1960

This cause came on for hearing this day on motion of Defendant, P. J. Donovan, to dismiss complaint, and on motion of Defendant, Minus Aizen, for Summary Judgment, and on motion of Plaintiff, Avondale Marine Ways, Inc., for Summary Judgment under Rule 56.

PRESENT: H. Martin Hunley, Esq.,
Attorney for Plaintiff
Francis G. Weller, Esq.,
Assistant U. S. Attroney
for P. J. Donovan, Defendant

Samuel C. Gainsburgh, Esq.,
Attorney for Minus Aizen, Deft.

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55 Argument.
Submitted.

IN THE UNITED STATES DISTRICT COURT

Order Granting Motion of Defendant, P. J. Donovan, to Dismiss Complaint: Order Granting Motion of Defendant, Minus Aizen, for Summary Judgment: and Order Denying Motion of Plaintiff for Summary Judgment—Oct. 10, 1960

This cause came on at a former day to be heard on the motion of defendant, P. J. Donovan, Deputy Commissioner, U. S. Department of Labor, to dismiss the complaint herein, as well as on the motion of the defendant, Minus Aizen, for summary judgment herein, and on the motion of plaintiff, Avondale Marine Ways, Inc., for summary judgment and was argued by counsel for the respective parties and submitted when the court took time to consider:

Whereupon and on due consideration thereof,

IT IS ORDERED BY THE COURT that the motion of the defendant, P. J. Donovan, Deputy Commissioner, U. S. Department of Labor, to dismiss the complaint be and the same is hereby, GRANTED.

It Is Further Ordered By the Court that the motion of the defendant, Minus Aizen, for summary judgment is treated by the court as a Motion to Dismiss, and said motion is hereby, Granted.

56 It Is Further Ordered By the Court that the motion of the plaintiff, Avondale Marine Ways, Inc., for summary judgment be and the same is hereby, Denied.

H.W.C.

IN THE UNITED STATES DISTRICT COURT

Judgment—October 10, 1960

This cause having been heard at a former day, on the motion of the defendants for summary judgment, and the court, after due consideration thereof, having granted said motion;

It Is Ordered, Adjudged and Decreed that judgment be, and is hereby entered, in favor of the defendant, P. J. Donovan, Deputy Commissioner, Seventh Compensation District, Bureau of Employees' Compensation, U. S. Department of Labor, and Minus Aizen, defendants, and against the plaintiff, Avondale Marine Ways, Inc., dismissing this suit, with costs.

H.W.C.

IN THE UNITED STATES DISTRICT COURT

Notice of Appeal—Filed November 18, 1960

Notice is hereby given that plaintiff Avondale Shipyards, Inc. hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment en-
57 tered in this action on October 25, 1960, denying plaintiff's motion for summary judgment and granting motion to dismiss of defendant, P. J. Donovan, Deputy

Commissioner, and granting motion for summary judgment of defendant Minus Aizen.

/s/ Charles Kohlmeyer, Jr.
Charles Kohlmeyer, Jr.

Lemle & Kelleher
Of Counsel

/s/ H. Martin Hunley, Jr.
H. Martin Hunley, Jr.
National Bank of Commerce Building
New Orleans 12, Louisiana

Attorneys for Avondale Shipyards, Inc.

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60 **Clerk's Certificate** to Foregoing Transcript
(Omitted in printing)

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61 IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18695

Avondale Shipyards, Inc.

versus

P. J. Donovan, Deputy Commissioner, Seventh Compensation District, Bureau of Employees' Compensation U. S. Department of Labor, and Minus Aizen

Argument and Submission—May 1, 1961

On this day this cause was called, and after argument by Charles Kohlmeyer, Esq., for appellant and David L. Rose, Esq., Attorney Department of Justice, for appellees, was submitted to the Court.

62 IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18695

AVONDALE SHIPYARDS, INC., *Appellant*,

versus

P. J. DONOVAN, Deputy Commissioner Seventh Compensation District, Bureau of Employees' Compensation, U. S. Department of Labor and MINUS AIZEN, *Appellees*.

Appeal from the United States District Court for the Eastern District of Louisiana.

Opinion—July 13, 1961

Before CAMERON, BROWN and WISDOM, Circuit Judges.

BROWN, Circuit Judge: This case presents for decision the identical question this day decided in *The Travelers Ins. Co. v. Calbeck, Deputy Commissioner*, 5 Cir., 1961, ... F. 2d ...., ... AMC .... [No. 18802], whether in-
63 juries received by a person working on an uncompleted vessel, launched and afloat but still under construction, are covered under the State or the Federal Longshoremen's Act.

The facts are not significantly different. The Employer, Avondale Marine Ways, Inc., has two large shipyards and regularly performs new construction work and repair work. Generally in the Employer's large labor force the work performed by a particular employee was primarily one rather than the other. Occasionally an employee would perform the other. The injured employee, however, worked regularly and solely in new construction. The injuries were received on August 11, 1956, while the employee was working as a welder on an uncompleted elevated deck drilling barge. The hull had been launched July 26, 1956, but

the vessel was not completed and delivered until November 17, 1956. By stipulation the barge, at the time of the accident, was 57% complete based both on probable dollar cost and estimated man hours of work.

Unlike the *Calbeck* case only one Award was issued here. On January 27, 1960, Deputy Commissioner Donovan entered an Award of compensation benefits under the Longshoremen's Act. This was, of course, subsequent to the two Orders of Deputy Commissioner Calbeck in the other similar case then pending before the Bureau of Employees' Compensation, but it was prior to the District Court's Order of April 20, 1960, which remanded the matter for further proceedings and resulted in a complete about-face. See note 5 in *Calbeck*, ... F. 2d ..... at ..... The uncertainty and confusion was, therefore, being generated by the two cases themselves.

64 As in the other case, we hold that injuries to such a worker may validly be covered by the State Compensation Act. Consequently, the Order of the Deputy Commissioner must be set aside as not in accordance with law, 33 USCA § 921(b).

This makes it unnecessary to pass on the additional contention of the Employer that payments aggregating several thousand dollars for compensation and medical expense ostensibly made under the Louisiana Act constituted such an administrative determination as to be within that aspect of *Davis* v. *Department of Labor*, 1942, 317 U. S. 249, 63 S. Ct. 225, 87 L. Ed. 246, 1942 AMC 1653.

REVERSED AND RENDERED.

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65 No. 18695

AVONDALE SHIPYARDS, INC.,

versus

P. J. DONOVAN, Deputy Commissioner Seventh Compensation District, Bureau of Employees' Compensation, U. S. Department of Labor, and MINUS AIZEN.

Judgment—July 13, 1961

This cause came on to be heard on the transcript of the record from the United States District Court for the

Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and here rendered for appellant, Avondale Shipyards, Inc.

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69 **Clerk's Certificate** to Foregoing Transcript
(Omitted in Printing)

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70 SUPREME COURT OF THE UNITED STATES

No. 532, October Term, 1961

C. D. CALBECK, DEPUTY COMMISSIONER, ETC., ET AL.
Petitioners,

vs.

TRAVELERS INSURANCE COMPANY, ET AL.

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 3d, 1961.

HUGO L. BLACK
Associate Justice of the Supreme Court of the United States.

Dated this 5th
day of October 1961.

71 SUPREME COURT OF THE UNITED STATES

No. 532, October Term, 1961

C. D. CALBECK, DEPUTY COMMISSIONER, ETC., ET AL.,
Petitioners,

vs.

TRAVELERS INSURANCE CO., ET AL.

Order Allowing Certiorari—Filed December 18, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

October Term, 1961

O. D. [illegible], Director, Bureau of Reclamation, United States Department of the Interior, et al.,

Petitioners,

v.

The Pacific Lumber Co. and Pacific Lumber Co.,

Respondents.

P. J. [illegible], Director, Bureau of Reclamation, United States Department of the Interior, et al.,

Petitioners,

v.

Arcata Redwood, Inc.,

Respondent.

[illegible]

[illegible]

[illegible]

INDEX

	Page
Opinions below	2
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	4
Reasons for granting the writ	9
Conclusion	19
Appendix A	21
Appendix B	38
Appendix C	40

CITATIONS

Cases:

Avondale Marine Ways v. *Henderson*, 346 U.S. 366 ..... 12, 13, 14, 15

Baizley Iron Works v. *Span*, 281 U.S. 222 12

Baskin v. *Industrial Accident Commission*, 338 U.S. 854, vacating 89 Cal. App. 2d 257, 632, 201 P. 2d 549; on remand, 97 Cal. App. 2d, 217 P. 2d 733, affirmed *sub nom. Kaiser Co.* v. *Baskin*, 340 U.S. 886 12

Bethlehem Steel Co. v. *Moores*, 335 U.S. 874, affirming *Moores's Case*, 323 Mass. 162, 80 N.E. 2d 478 12

Davis v. *Department of Labor*, 317 U.S. 249 ..... 10, 11, 12, 14, 16

Dixie Sand & Gravel Corporation v. *Holland*, 255 F. 2d 304 ..... 15, 16

Grant Smith-Porter Ship Co. v. *Rohde*, 257 U.S. 469 .. 8, 9, 14

Great Lakes Dredge & Dock Co. v. *Kierejewski*, 261 U.S. 479 12

Hahn v. *Ross Island Sand & Gravel Co.*, 358 U.S. 272 .. 14

Industrial Commission v. *Nordenholt*, 259 U.S. 263 ... 14

Kelly v. *Summers*, 210 F. 2d 665 6

Morrison-Knudsen Co. v. *O'Leary*, 288 F. 2d 542, certiorari denied, October 9, 1961, No. 99, this Term 15

Newport News Shipbuilding & Dry Dock Co. v. *O'Hearne*, 192 F. 2d 968 ..... 15, 17

Cases—Continued Page

Parker v. *Motor Boat Sales*, 314 U.S. 244 14-15
Pennsylvania Railroad Co. v. *O'Rourke*, 344 U.S. 334 .. 12, 13, 16
Travelers Insurance Co. v. *McManigal*, 139 F. 2d 949 .. 15, 17
United States Casualty Co. v. *Taylor*, 64 F. 2d 521, certiorari denied, 290 U.S. 639 16
Voris v. *Eikel*, 346 U.S. 328 18

Statutes:

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901, *et seq.*:
Section 902 2
Section 903 3
Section 903(a) 3, 9
Section 904 3
Section 906(b) 7
Section 908(a) 7
Section 909 6
Section 920 3
Section 920(a) 3

La. R.S.:
Section 23:1202 6
Section 23:1221 6

Texas Workmen's Compensation Law:
V.R.C.S., Art. 8306, § 8 6

Miscellaneous:

Comment, *Overlapping Remedies for Injured Harbor-workers: Interaction on the Waterfront*, 67 Yale L.J. 1205 17
Employment and Earnings, Bureau of Labor Statistics, Department of Labor (July, 1961 issue) 18
H. Rep. No. 1767, 69th Cong., 2d Sess 17
H. Rep. No. 2287, 85th Cong., 2d Sess 17
2 Larson, *Workmen's Compensation* 19
Rodes, *Workmen's Compensation for Maritime Employees: Obscurity in the Twilight Zone*, 68 Harv. L. Rev. 637 17
S. Rep. No. 973, 69th Cong., 1st Sess 17

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. ——

C. D. CALBECK, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

THE TRAVELERS INSURANCE CO. AND LEVINGSTON SHIPBUILDING CO.

P. J. DONOVAN, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

AVONDALE SHIPYARDS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of Deputy Commissioner C. D. Calbeck and Deputy Commissioner P. J. Donovan, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit entered in these cases on July 13, 1961.

OPINIONS BELOW

The opinion of the district court in the *Travelers Insurance* case has not yet been reported. The district court rendered no opinion in the *Avondale* case. The opinions of the court of appeals in the cases (App. A and B, *infra*, pp. 21–39) are reported at 293 F. 2d 52 and 51, respectively.

JURISDICTION

The judgments of the court of appeals were entered on July 13, 1961 (App. C, *infra*, pp. 40–41). By order dated October 5, 1961, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including November 3, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether injuries sustained by an employee while working on a vessel under construction that was afloat upon navigable waters are excluded from the coverage of the Longshoremen's and Harbor Workers' Compensation Act because recovery for such injuries may be had under a State workmen's compensation law.

STATUTE INVOLVED

The Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. 901, *et seq.*, provides in pertinent part:

§ 902. DEFINITIONS.

When used in this chapter—

* * * * *

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, * * *.

* * * * *

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock).

* * * * *

§ 903. COVERAGE.

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. * * *

* * * * *

§ 904. LIABILITY FOR COMPENSATION.

(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907–909 of this title. * * *

* * * * *

§ 920. PRESUMPTIONS.

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter.

* * * * *

STATEMENT

These cases involve the application of the Longshoremen's and Harbor Workers' Compensation Act ("the Longshoremen's Act") to injuries sustained by employees while working on vessels under construction that are afloat on navigable waters. The basic facts in each case were found by the Deputy Commissioner and are not in dispute.

1. (a) *The Travelers Insurance case.* The employer owns and operates a shipyard on the Sabine River, between Orange, Texas, and Calcasieu Parish, Louisiana, at which it constructs new vessels and repairs completed vessels. Its employees work on both kinds of vessels, and it is usual for an employee to work on a repair project one day, and upon new construction the next (R. 24, 39–42).[1] The employer had numerous employees engaged in traditional maritime employment upon navigable waters (R. 15, 40–41).

Roger McGuyer was a welder employed by the employer at an average wage of $81 a week. On July 8, 1957, he was working upon an oil drilling barge which was in process of construction. The barge was afloat on the navigable waters of the Sabine River in Louisiana (R. 14–15). The barge had been launched, and the superstructure was being built. While McGuyer was welding on the port side of the deck, a tank exploded about 40 feet away, throwing a bucket through the air which struck him and caused severe head injuries. On July 16, 1957, he died from a

[1] References are to the printed record in the court of appeals in each case.

cerebral concussion which resulted from those injuries. He was survived by his wife and two children (R. 14–16).

(b) *The Avondale Shipyards case.* The employer, which is qualified as a self insurer under the Act, operates two shipyards near New Orleans, Louisiana, where it builds and repairs vessels. At its Avondale yard, the greater part of the work consists of fabrication of machinery and structural steel and the construction of new vessels, but repair work on completed vessels, which is the principal work at its second yard, is also performed there. The employer has numerous employees at both plants who are engaged in traditional maritime employment (repair work) upon navigable waters (R. 48–49).

Minus Aizen was a 25 year old tack welder employed at the Avondale yard at an average weekly wage of $89.32 (R. 38, 49, 51). On August 11, 1956, he was engaged in work upon a drilling barge intended for use in offshore oil operations. The barge had been launched and was floating on the Mississippi River but had not been completed (R. 49–50). When he was placing an eye-lug welded to pipe in proper place with a "come-along", the latter broke and caused a piece of steel to hit him on the head, knocking him off the scaffold onto the barge below and then into the river (R. 33, 38, 50). He suffered a fractured skull, brain damage, a fractured right forearm, broken left wrist, arm, and hip, and body contusions (R. 33, 39). As a result of these injuries, which arose out of and in the course of his employment, Aizen suffered total and permanent disability (R. 50–51).

2. The Texas Workmen's Compensation Law could probably have been applied to Roger McGuyer's death, even though the injury occurred within Louisiana.[2] It provides that the maximum compensation for death is $35 a week for a period of 360 weeks, or a gross amount of $12,600. V.R.C.S., Art. 8306, § 8. The Longshoremen's Act, however, provides maximum benefits for an employee's death of $54 a week during widowhood and dependency. Under that Act, Mrs. McGuyer and her children would receive $52.65 a week as long as the children were under 18, and Mrs. McGuyer would receive $28.35 thereafter during widowhood. 33 U.S.C. 909. Based upon standard mortality tables, the gross amount due for McGuyer's death under the Longshoremen's Act would be approximately $77,500[3]—six times more than the sum recoverable under the Texas Workmen's Compensation Law.

The maximum payment for total disability for Minus Aizen under the Louisiana Workmen's Compensation Act would be $35 a week, for a period of 400 weeks, or a gross amount of $14,000. La. R.S. 23: 1202 and 1221. Under the Longshoremen's Act, however, he was entitled to $54 a week for life. 33 U.S.C. 906(b) and 908(a). Based on a life expectancy of 40 years, he could expect to receive a gross amount of $112,320 under federal coverage, plus medical expenses—at least eight times the payments under the Louisiana law.

Mrs. McGuyer and Aizen both elected to seek compensation under the Longshoremen's Act by filing

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[2] See *Kelley* v. *Summers*, 210 F. 2d 665, 673 (C.A. 10).

[3] Brief for Appellees McGuyer, in the court of appeals, p. 6.

claims for benefits thereunder. In each case the employer had actual knowledge of the injury and the employer (or insurance carrier) had attempted (prior to the filing of the claim) to pay compensation due under the applicable state law.[4] In each case, after a full hearing, the Deputy Commissioner found the facts set forth above and made an award of compensation under the Longshoremen's Act.[5] In each case the employer sought judicial review, and in each case the district court upheld the award.

The Court of Appeals for the Fifth Circuit reversed in both cases. In the principal opinion (in

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[4] In the *Travelers Insurance* case the insurance carrier actually paid McGuyer's widow and children $153.57, purportedly under the Texas Workmen's Compensation Act (R. 16). In the *Avondale* case, the employer paid Aizen $35 a week for 180 weeks with checks which indicated that they represented payment under the Louisiana Workmen's Compensation Act, plus medical expenses, and also paid him approximately $3800 by checks marked "advance on compensation" (R. 17, 51).

[5] In the *Travelers Insurance* case, Deputy Commissioner Calbeck originally denied the claim of Mrs. McGuyer and her children for death benefits on the ground that work on uncompleted vessels is not within the coverage of the Act. When the claimants brought suit to review the denial of the claim in the *Travelers* case, Deputy Commissioner Calbeck, after various procedural motions, filed an answer on January 11, 1960, admitting the allegations and asking that the case be remanded. In the meantime, Deputy Commissioner Donovan had made an award to the claimant in *Avondale* on January 27, 1960 (R. 51–53). On April 20, 1960, the district court remanded the *Travelers* case, and Deputy Commissioner Calbeck thereafter entered an award under the Longshoremen's Act in favor of Mrs. McGuyer and her children. (Civil Action No. 7507, W.D. La.).

the *Travelers Insurance* case), it held (per Judge Brown) that although longshoremen working on a ship and repairmen working on a completed vessel are covered by the Longshoremen's Act, "persons working on an uncompleted vessel afloat but under construction" are covered only by state workmen's compensation laws (App. A, *infra*, p. 36). The court noted (*id.*, pp. 24–25) that Section 903(a) of the Longshoremen's Act (*supra*, p. 3) provides that compensation thereunder "shall be payable * * * only if * * * recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." It stated, (*id.*, p. 25) that, five years before the enactment of the Longshoremen's Act in 1927, this Court, in *Grant Smith-Porter Ship Company* v. *Rohde*, 257 U.S. 469, held that a State "could provide workmen's compensation to a person injured while working on an uncompleted vessel then under construction and afloat in navigable waters"; and that "the line which the Court drew in the pre-1927 days" between "uncompleted construction versus repair of a completed vessel" "was the line which Congress adopted in § 903(a) * * *" (App. A, pp. 25–26; see *id.*, p. 30). In that section Congress "adopted" the "categorical pre-1927 holding * * * that injuries on an uncompleted vessel afloat but still under construction may, in the words of the statute, be 'validly * * * provided by state law'" (*id.*, p. 34).

REASONS FOR GRANTING THE WRIT

The court of appeals in these cases has announced the rule that employees injured while working on vessels under construction which are afloat on navigable waters are not covered by the Longshoremen's Act. This ruling is contrary to the standards which this Court has applied in determining the coverage of the Longshoremen's Act; it conflicts in principle with the decisions of three other circuits; and it presents an important question in the administration of the Longshoremen's Act which affects many thousands of shipyard workers.

1. A literal reading of the Act would appear to support the decision below. Section 3(a) (33 U.S.C. 903(a) (*supra*, p. 3) provides that compensation shall be payable under the Act only (1) if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock), and (2) "if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." In 1922 this Court held that the Oregon workmen's compensation statute, which provided the exclusive remedy for injuries suffered within the State, could be constitutionally applied to injuries sustained by a workman on a vessel in process of construction which was on navigable waters within the State. *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U.S. 469. Thus, if the *Rhode* case stands for the broad proposition that a State compensation law may apply to injuries sustained while working on new construction on navigable waters (as

the court below held), and if recovery under the Longshoremen's Act is barred whenever a State workmen's compensation law may validly cover the injury, the court below correctly held that the Act does not apply to the injuries suffered in these cases while the employees were performing construction work upon new vessels afloat upon navigable waters.

In a series of cases, however, this Court has implicitly rejected this literal reading of the Act, and has indicated its applicability to injuries occurring upon navigable waters even though they may also be compensable under State compensation laws. In *Davis v. Department of Labor*, 317 U.S. 249, 256, the Court, in holding that a State could apply its compensation law to the death of a construction company employee who was killed while working on a barge on a navigable river, recognized that there is a "twilight zone" in which recovery for injuries occurring upon navigable waters may, at the election of the injured employee, be had under either federal or State law. The Court stated (pp. 255–256) that since "the line separating the scope" of federal and State jurisdiction was "undefined and undefinable with exact precision, marginal employment may, by reason of particular facts, fall on either side"; and that

> * * * we must give great—indeed, presumptive—weight to the conclusions of the appropriate federal authorities and to the state statutes themselves. Where there has been a hearing by the federal administrative agency entrusted with broad powers of investigation, fact finding, determination, and award, our task proves

> easy. There, we are aided by the provision of the federal act, 33 U.S.C. § 920, which provides that, in proceedings under that act, jurisdiction is to be "presumed, in the absence of substantial evidence to the contrary." Fact findings of the agency, where supported by the evidence, are made final. Their conclusion that a case falls within the federal jurisdiction is therefore entitled to great weight and will be rejected only in cases of apparent error. * * *

Mr. Justice Frankfurter, in a concurring opinion, stated (p. 259) that "the practical result" of the Court's practice was that "the employee in a situation like the present is permitted to recover either under the federal act * * * or under a state statute * * *." Mr. Chief Justice Stone, dissenting, similarly recognized that the Court had enunciated the doctrine "that recovery under either the state or the federal act is to be sustained if the case is thought a close one" (p. 261), and he criticized the "proposition that an employee in a 'twilight zone' (where it is doubtful whether the federal or a state act applies) can recover under either act * * *" (p. 262).

Following the *Davis* case, this Court twice held, *per curiam*, that State compensation laws cover injuries incurred by employees while repairing existing vessels on navigable waters, even though prior to the Longshoremen's Act it had held that recovery for such injuries could be had only under federal maritime law, and not under State compensation

laws.[6] *Bethlehem Steel Co.* v. *Moores*, 335 U.S. 874, affirming 323 Mass. 162, 80 N.E. 2d 478; *Baskin* v. *Industrial Accident Commission*, 338 U.S. 854, vacating the judgment in 89 Cal. App. 2d 632, 201 P. 2d 549, and remanding for reconsideration in the light of the *Moores* case, *supra*.[7]

In *Avondale Marine Ways* v. *Henderson*, 346 U.S. 366, the Court upheld the applicability of the Longshoremen's Act to an injury that occurred on land. An employee was killed while working approximately 400 feet from the water, on a barge that had been drawn out of the water on a marine railway. The employer argued that since the injury occurred on land, the State compensation law could validly apply and that the federal Act was therefore inapplicable. Brief for petitioner, No. 44, October Term, 1953, pp. 7–25. This Court, however, affirmed *per curiam*, the award under the federal statute, citing the *Davis*, *Moores* and *Baskin* cases, *supra*.[8]

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[6] *Baizley Iron Works* v. *Spun*, 281 U.S. 222; *Great Lakes Dredge & Dock Co.* v. *Kierejewski*, 261 U.S. 479.

[7] Following the remand, the California court ordered the State Industrial Accident Commission to take jurisdiction of the claim under the State compensation law (97 Cal. App. 2d 257, 217 P. 2d 733), and this Court affirmed that order. *Kaiser Company* v. *Baskin*, 340 U.S. 886.

[8] In *Pennsylvania Railroad Co.* v. *O'Rourke*, 344 U.S. 334, a freight brakeman was injured while releasing a brake on a railroad freight car that was located on a car float on navigable waters. The question was whether the Longshoremen's Act or the Federal Employers' Liability Act applied. In holding that the injuries were compensable exclusively under the Longshoremen's Act, this Court first stated (p. 337) that "New Jersey could not have enacted statutes granting compensation for respondent's injury on navigable water. Therefore respondent

The present cases, in which the injuries occurred upon navigable waters, are obviously stronger cases for the applicability of the federal statute than the *Avondale Marine Ways* case where, although the employee was injured while working on a barge, the actual accident occurred on land. In both *Avondale Marine Ways* and the present cases, State law might validly provide compensation for the injuries. The decision in *Avondale Marine Ways* upholding the applicability of the federal Act necessarily means that coverage under that Act is not foreclosed merely because the employee could also be covered by State law.

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comes within the coverage of that portion of § 903(a) that includes those outside the reach of state compensation laws." The Court then ruled (p. 339) that the fact that the employee's duties were commonly regarded as "railroading" rather than those of longshoremen "misses the mark. The statute applies, by its own terms, to accidents on navigable waters when the employer has any employees engaged in maritime service." The Court stated (p. 340) that the exclusive coverage of the Longshoremen's Act "extends to an employee of an employer, made liable by § 904, when he is injured, in the course of his employment, on navigable water. The Court of Appeals, we think, is in error in holding that the statute requires, as to the employee, both injury on navigable water and maritime employment as a ground for coverage by the Compensation Act."

The Court thus held that, regardless of the nature of the individual employee's activity at the time of the accident, the Longshoremen's Act applied if the injury occurred upon navigable waters. The Court's reference to "that portion of § 903 (a) that includes those outside the reach of state compensation laws" does not indicate that, if the injury is within the reach of such laws, the Longshoremen's Act cannot apply. Moreover, to whatever extent it may so indicate, this statement appears contrary to the *Avondale Marine Ways* case, *supra*, decided the next Term after *O'Rourke*.

The court of appeals in the present cases attempted to distinguish *Avondale Marine Ways* on the ground that here there was "the categorical pre-1927 holding" in *Grant Smith-Porter Ship Co.*, v. *Rohde*, 257 U.S. 469, that a State may validly provide compensation for injuries sustained while working on uncompleted construction upon navigable waters (App. A., *infra*, pp. 33–34). There was, however, an equally "categorical pre-1927 holding" that a State may provide compensation for injuries sustained while performing maritime work upon land—the precise situation which this Court held in *Avondale Marine Ways* was covered by the federal Act. *Industrial Commission* v. *Nordenholt*, 259 U.S. 263.

In short, the teaching of the line of cases starting with *Davis* is that, in the "twilight zone" in which injuries occurring upon navigable waters may also be compensable under State law, the employee has an election to seek redress under either federal or State law. See *Haha* v. *Ross Island Sand & Gravel Co.*, 358 U.S. 272, 273. The court below, by denying the employees the right to federal coverage in the present "twilight zone" cases, has thus failed to follow the controlling decisions of this Court. Here, the employees elected to proceed under the federal law, and, as this Court stated in *Davis* (317 U.S. at 256–257), the conclusion of the deputy commissioner "that a case falls within the federal jurisdiction is therefore entitled to great weight and will be rejected only in cases of apparent error." See *Parker* v. *Motor Boat*

Sales Co., 314 U.S. 244,[2] and the *Avondale Marine Ways* case, *supra*.

2. The decisions below, which hold that the Longshoremen's Act is not applicable to injuries occurring upon navigable waters for which State compensation laws may validly provide recovery, conflict in principle with the decisions of three circuits which have upheld the coverage of the federal Act for accidents subject to State compensation laws. The Fourth Circuit has sustained the applicability of the federal Act to injuries suffered by workers while engaged in the construction of a dry dock. *Travelers Insurance Co.* v. *McManigal*, 139 F. 2d 949; see, also, *Newport News Shipbuilding & Dry Dock Co.* v. *O'Hearne*, 192 F. 2d 968. The Ninth Circuit has held the federal Act applicable to injuries sustained while working upon navigable waters by employees constructing a dam on a river. *Morrison-Knudsen Co.* v. *O'Leary*, 288 F. 2d 542, certiorari denied, October 9, 1961 (No. 99, this Term). Under the rationale of the court of appeals in the present cases, however, none of these injuries would be covered by the Longshoremen's Act.

In *Dixie Sand & Gravel Corporation* v. *Holland*, 255 F. 2d 304, the Sixth Circuit held that the Longshoremen's Act applied to the death of a clean-up man in a sand and gravel yard located on the bank of a

[2] In *Parker* v. *Motor Boat Sales*, 314 U.S. 244, this Court sustained an award of compensation under the Longshoremen's Act for injuries sustained by a janitor or porter suffered on navigable waters while testing an outboard motor for his employer, a local boat dealer.

navigable river, which occurred when he fell off a barge while inspecting it. The court ruled (p. 307) that since the death occurred upon navigable waters, "his widow was entitled to compensation under the Act if his death arose out of and in the course of his employment, whether or not he was engaged in 'maritime employment.'" See also *Pennsylvania Railroad Co.* v. *O'Rourke*, 344 U.S. 334, *supra*, pp. 12–13, footnote 8. The ruling in *Dixie Sand* that the Longshoremen's Act applies in such circumstances is inconsistent with the view of the court of appeals in the present cases that, even though those circumstances are present, the Act does not apply if compensation may be available under State law.

3. For these reasons, we believe that the decisions of this Court and of other courts of appeals fully sustain the rulings by two deputy commissioners, upheld by two different district courts. But in any event, the question whether injuries sustained by employees while working on new construction afloat on navigable waters are covered by the federal Act is one that this Court should decide. Other than the decisions below, we have found no cases since *Davis* which have disallowed an election by employees injured while working on navigable waters to seek compensation under the Longshoremen's Act.[10] Simi-

[10] Prior to *Davis*, the Fourth Circuit had held that the Longshoremen's Act does not cover injuries sustained by an employee working on new construction afloat on navigable waters. *United States Casualty Co.* v. *Taylor*, 64 F. 2d 521, certiorari denied, 290 U.S. 639. As the court of appeals noted in these cases, however, the *Taylor* case is "no longer followed" by the

larly, commentators have agreed that federal coverage is not to be denied merely because the injury might also be compensable under State law.[11] The decisions of the court of appeals in these cases will inevitably create doubt and uncertainty in an important area of federal law that has hitherto been considered settled.

The decisions below would lead to anomalous results. For example, a shipyard employee would not be covered by the federal statute if he were working on a new ship, but would be covered if he momentarily happened to move over to work on an existing ship which was next to the new one.[12] There is nothing in the language or the legislative history of the Longshoremen's Act which indicates that Congress intended to produce such inconsistencies,[13] or that it intended

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Fourth Circuit (App. A, *infra*, p. 33, n. 20). See the *McManigal* and *O'Hearn* cases, *supra*, p. 15.

[11] Rodes, *Workmen's Compensation for Maritime Employees: Obscurity in the Twilight Zone*, 68 Harv. L. Rev. 637, 644; Comment, *Overlapping Remedies for Injured Harborworkers: Interaction on the Waterfront*, 67 Yale L. J. 1205.

[12] Roger McGuyer, the deceased employee in the *Travelers Ins. Co.* case, was a welder. It was the practice in his shipyard for welders to do repair work on completed vessels on one day and work on new vessels on the next (R. 41–42).

[13] On the contrary, the legislative history is fully consistent with the view that Congress merely intended to apply the traditional line of demarcation between state and federal maritime jurisdiction, namely, that injuries upon navigable waters (including dry docks) would be compensable under the federal Act, and injuries on land would be compensable under State compensation legislation. See S. Rep. No. 973, 69th Cong., 1st Sess., p. 16; H. Rep. No. 1767, 69th Cong., 2d Sess., p. 19. Indeed a report accompanying the most recent Congressional amendment to the Act indicates that this was the intent of Congress. H. Rep. No. 2287, 85th Cong., 2d Sess., p. 2.

federal coverage to depend on whether, prior to the Act, this Court had considered the applicability of State compensation laws to the particular maritime employment involved. As this Court has pointed out, the Longshoremen's Act "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results" (*Voris* v. *Eikel*, 346 U.S. 328, 333).

The question of the compensation coverage of workers engaged in the construction of new vessels upon navigable waters is important and recurring. There are approximately 120,900 employees of private shipyards in the United States, of which 18,400 are in the Gulf Region (which includes Florida, Alabama, Mississippi, Louisiana, and Texas, but not Georgia). See p. 17 of the July, 1961 issue, *Employment and Earnings*, Bureau of Labor Statistics, Department of Labor. Because most of the shipyards perform both construction and repair work, no statistics are available on the number of employees engaged in construction of new vessels, and that number probably varies from day to day. However, the number engaged in construction work undoubtedly constitutes a large proportion of the 120,900 employees, and a substantial number of those who are engaged in construction of new vessels work upon navigable waters. Disparities between the amount of compensation provided under the Longshoremen's Act and the smaller amounts provided under State law, similar to those here involved (see *supra*, pp. 6–7), are common, particularly in cases where the injury results in death or total disability of the

employee.[14] Thus the question presented here vitally affects important rights of many thousands of employees.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

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NOVEMBER 1960.

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[14] 2 Larson, *Workmen's Compensation*, Appendix B, Table 8, pp. 524–525, and Table 15, pp. 548–549.

APPENDIX A

In the United States Court of Appeals for the Fifth Circuit

No. 18802

THE TRAVELERS INSURANCE COMPANY AND LEVINGSTON SHIPBUILDING COMPANY, APPELLANTS

v.

C. D. CALBECK, DEPUTY COMMISSIONER, EIGHTH COMPENSATION DISTRICT FOR THE BUREAU OF EMPLOYEES' COMPENSATION, U.S. DEPARTMENT OF LABOR, ET AL., APPELLEES

Appeal from the United States District Court for the Western District of Louisiana.

(July 13, 1961)

Before CAMERON, BROWN and WISDOM, *Circuit Judges.*

BROWN, *Circuit Judge:* We have again the old, old contest: is the claim for injuries to an amphibious worker under the State Compensation Act? Or is it under the Federal Act?[1] Phrasing it differently, the question is all embracing. As to an occurrence of this type, has there been doubt and uncertainty in the past as to coverage? If not, what is there about contemporary developments which should now make twilight out of that which has been thought to be as clear

[1] Longshoremen's and Harbor Workers' Compensation Act, 33 USCA §§ 901-950.

as day or as black as night?[2] Specifically the question presented is whether a person injured while working on an uncompleted vessel then launched and afloat in navigable waters, but still under construction, is covered by the State Act, or the Longshoremen's Act, or perhaps either one or both depending on the injured party's ultimate choice under the "first-come-first-served"[3] Twilight Zone option?

Again as we remarked before, "the facts, strikingly simple, neither complex nor conflicting, are not the cause of bewilderment." *Flowers* v. *Travelers Ins. Co.*, 5 Cir., 1958, 258 F. 2d 220 at 221. The Employer operates a shipyard on the Sabine River. At the shipyard it builds new vessels and also repairs completed ships. Its employees, including welders, perform work both on repairs and on construction. There is constant interchange between the two types of work. The Employee McGuyer on July 15, 1957, was injured while working on an oil drilling barge then under construction. The barge had been launched and the superstructure was being built. While McGuyer was welding on the port side of the deck, a tank exploded causing severe head injuries from which he died three days later. The drilling barge had never been used in navigation, and there was still substantial work to be done before it could be so utilized.

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[2] By rare coincidence the identical question is before us in a separate case from a different district. Argued and submitted on the same day, it has been decided this day. *Avondale Shipyards, Inc.* v. *P. J. Donovan, Deputy Commissioner*, 5 Cir., 1961, ---- F. 2d ----, ---- AMC ---- [No. 18,695].

[3] *Davis* v. *Department of Labor of Washington*, 1942, 317 U.S. 249, 63 S. Ct. 225, 87 L. Ed. 246, 1942 AMC 1653, was so characterized in *De Bardeleben Coal Corp.* v. *Henderson*, 5 Cir., 1944, 142 F. 2d 481 at 483.

In proceedings before the Deputy Commissioner[4] the original Compensation Order made on February 18, 1959, rejected the claim for death benefits filed by the widow and children. The Deputy Commissioner went right to the heart of the matter. As the reason for rejecting the claim, he formally stated that "It has not been held that the work on an uncompleted vessel comes within the provisions of the Longshoremen's and Harbor Workers' Compensation Act."

But while that was thought to be the final order it was not. Indeed, a year and a half later the final Award now under review was a complete reversal and held that the Longshoremen's Act did apply. In review proceedings that Order was twice remanded to the Deputy Commissioner.[5] Except that there was an elaboration on essentially inconsequential details, the last Award of May 13, 1960, with no explanation for the change of decision, now declared the injury subject to the Longshoremen's Act and made an Award of death benefits. The record, as such, does not spell out this change of heart. On the argument, however, there was general agreement by all counsel that this change in the Deputy Commissioner's de-

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[4] United States Department of Labor, Bureau of Employees' Compensation.

[5] Apparently the Employer took an appeal under 33 USCA § 921(b) from the original Order of February 18, 1959. The Court remanded the case for further proceedings for the Deputy Commissioner "to reconsider the question of the situs of injury to be in Orange, Texas." By a modification award on July 30, 1959, the order was amended to show the situs to be Calcasieu Parish, Louisiana. The Order as thus amended, denying benefits for want of coverage, was again brought before the Court. On April 20, 1960, the Court again remanded it to the Deputy Commissioner "in order to permit him to make findings and conclusions in accordance with the facts and the law."

cision was largely the result of a like change of view by the Bureau of Employees' Compensation concerning the underlying legal question of coverage for new construction. For reasons we later discuss, we regard this change as significant, not because either counsel or court consider this an intrusion into the independent adjudicatory functions of the Deputy Commissioner, but rather as a convincing demonstration that until these two cases[6] there was no serious contention that new construction work was covered.

While this problem has its genesis in the constitutional travail which gave birth to *Jensen*,[7] which despite severe criticism displays a remarkable tenacity so that each year sees fresh evidence of its continued vitality, *Kossick* v. *United Fruit Co.*, 1961, — U.S. —, — S. Ct. —, 6 L. Ed. 2d 56, our inquiry is no longer on that level. Now it is simply a question of statutory construction to determine, not how far Congress could have gone, or what Congress had to do, but rather what Congress did.[8] That question of statutory construction centers around § 903(a)[9] which defines the coverage of the Longshoremen's Act in terms

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[6] See note 2, *supra*.

[7] *Southern Pacific Co.* v. *Jensen*, 1917, 244 U.S. 205, 37 S. Ct. 524, 61 L. Ed. 1086.

[8] To the synopsis in *Flowers*, *supra*, 258 F. 2d 220 at 221, note 2, may be added that developed in some subsequent cases of this Court. *T. Smith & Sons, Inc.* v. *Williams*, 5 Cir., 1960, 275 F. 2d 397 at 398–401; *Atlantic & Gulf Stevedores, Inc.* v. *Donovan*, 5 Cir., 1960, 274 F. 2d 794, 1960 AMC 1311, modified on rehearing, 279 F. 2d 75; *Noah* v. *Liberty Mutual Ins. Co.*, 5 Cir., 1959, 265 F. 2d 547, 1959 AMC 573, overruled on rehearing en banc 5 Cir., 267 F. 2d 218, 1959 AMC 2047; *Thibodeaux* v. *J. Ray McDermott & Co.*, 5 Cir., 1960, 276 F. 2d 42.

[9] The numbers in brackets [1] and [2] are inserted to emphasize the two distinctive separate jurisdictional requirements:

33 USCA § 903(a). "Compensation shall be payable under this chapter in respect of disability or death of an employee,

which are jurisdictional in nature and impact. *Crowell* v. *Benson*, 1932, 285 U.S. 22, 52 S. Ct. 285, 76 L. Ed. 598. Precisely the question relates to prerequisite [2] "if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law."

We start with an historic legal fact. In 1922 five years before the enactment of the Longshoremen's Act in response to the constitutionally unsuccessful efforts to adopt state compensation laws for maritime workers, the Supreme Court dealt with this very situation. With *Jensen* then, as now, a matter of everyday preoccupation, the Court held that Oregon could provide workmen's compensation to a person injured while working on an uncompleted vessel then under construction and afloat in navigable waters. *Grant Smith-Porter Ship Company* v. *Rohde*, 1922, 257 U.S. 469, 42 S. Ct. 157, 66 L. Ed. 321. That the line was drawn precisely on uncompleted construction versus repair of a completed vessel is demonstrated overwhelmingly by contemporary cases upholding the supremacy of admiralty and prohibiting the application of state compensation acts to injuries received by those repairing existing vessels.[16] Rejecting the

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but only if [1] the disability or death results from an injury occurring upon the navigable waters of the United States (including any drydock) and if [2] recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law."

[16] *John Baizley Iron Works* v. *Spun*, 1930, 281 U.S. 222, 50 S. Ct. 306, 74 L. Ed. 819, 1930 AMC 755; *Robins Drydock & Repair Co.* v. *Dahl*, 1925, 266 U.S. 449, 45 S. Ct. 157, 69 L. Ed. 372, 1925 AMC 182; *Great Lakes Dredge & Drydock Co.* v. *Kierejewski*, 1923, 261 U.S. 479, 43 S. Ct. 418, 67 L. Ed. 756, 1923 AMC 441; *Gonsalves* v. *Morse Dry Dock & Repair Co.*, 1924, 226 U.S. 171, 45 S. Ct. 39, 69 L. Ed. 228, 1924 AMC 1539; *Messel* v. *Foundation Co.*, 1927, 274 U.S. 427, 47 S. Ct. 695, 71 L. Ed. 1135, 1927 AMC 1047.

contention of the injured repairman that "when hurt he was doing work of a nature which had no direct relation to navigation or commerce; and to permit application of the state Workmen's Compensation Act would work no material prejudice to the essential features of the general maritime law as in *Grant Smith-Porter Ship Co.* v. *Rhode* * * *," the Court went on to pinpoint the very ground of distinction. "In *Grant Smith-Porter & Co.* v. *Rohde, supra,* claimant when injured was working upon an incompleted vessel—a thing not yet placed into navigation, and which had not become an instrumentality of commerce." *Baizley Iron Works* v. *Span, supra,* 281 U.S. 222 at 230, 231.

And the line which the Court drew in the pre-1927 days was the line which Congress adopted in § 903(a), note 9, supra. The Court itself has said so in the plainest of terms, often repeated.[11] "The main impetus for the longshoremen's * * * Act was the need to correct a gap made plain by decisions of this Court. We believe that there is only one interpretation of the proviso in § 3(a) which would accord with the

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[11] *Davis* v. *Department of Labor of Washington*, 1942, 317 U.S. 249 at 256, 63 S. Ct. 225, 87 L. Ed. 246, 1942 AMC 1653, the Court stated: "In our decision in *Parker* v. *Motor Boat Sales* * * * we held that Congress has by the Longshoremen's Act accepted the Jensen line of demarcation between state and federal jurisdiction."

Even more recently in *Pennsylvania Ry. Co.* v. *O'Rourke*, 1952, 344 U.S. 334, 73 S. Ct. 302, 97 L. Ed. 367, 1953 AMC 237, it first stated, "This Act and the Jones Act provided means for indemnification for injuries for all maritime employees who were beyond the constitutional reach of state legislation." The Court went on to declare: "A quarter of a century of experience has not caused Congress to change the plan. The 'Jensen line of demarcation between state and federal jurisdiction' has been accepted." 344 U.S. 334 at 337.

aim of Congress; the field in which a state may not validly provide for compensation must be taken, for the purposes of the Act, as the same field which the Jensen line of decision excluded from state compensation laws. Without affirming or rejecting the *constitutional* implications of those cases, we accept them as the measure by which Congress intended to mark the scope of the Act they brought into existence." *Parker* v. *Motor Boat Sales, Inc.*, 1941, 314 U.S. 244 at 250, 62 S. Ct. 221, 86 L. Ed. 184, 1942 AMC 1.

Of course in this analysis we may not ignore the Twilight Zone concept announced by *Davis, supra.* In effect it holds that where it is difficult to ascertain what the line is, or on which side of any such assumed line the facts put a particular case, "an injured waterfront employee" was given "an election to recover compensation under either the Longshoremen's Act or the Workmen's Compensation Law of the State in which the injury occurred." *Hahn* v. *Ross Island Sand & Gravel Co.*, 1959, 358 U.S. 252 at 273, 79 S. Ct. 266, 3 L. Ed. 2d 292. But neither *Davis* nor *Moore*[12] nor *Baskin*[13] were intended to make everything twilight merely because the injury occurred near the waterfront to one who worked in, on, under or around it. The Twilight Zone concept was "devised to solve cases in, not to create, the twilight." *Flowers* v. *Travelers Ins. Co., supra*, 258 F. 2d at 228.

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[12] Moore's case, 1948, 323 Mass. 162, 80 N.E. 2d 478, 1958 AMC 1862, affirmed *per curiam, sub nom. Bethlehem Steel Co.* v. *Moore*, 1948, 335 U.S. 874, 69 S. Ct. 239, 93 L. Ed. 417.

[13] *Baskin* v. *Industrial Accident Commission*, 1949, 338 U.S. 854, 70 S. Ct. 99, 94 L. Ed. 523, reversing, *per curiam*, 89 Cal. App. 2d 632, 201 Pac. 2d 549; on remand to the state court, 97 Cal. App. 2d 257, 217 Pac. 2d 733, affirmed *per curiam, Kaiser Co., Inc.* v. *Baskin*, 1950, 340 U.S. 886, 71 S. Ct. 208, 95 L. Ed. 643.

Indeed, *Davis* properly understood is a recognition that there are *some* activities and some areas in which the *Jensen* line is clear and distinct. As to those the command of Congress is emphatic: those on the "admiralty" side are exclusively covered by the Longshoremen's Act; those on the "maritime but local"[14] side are state.

There is here more than the normal compulsion to heed the congressional command simply because it is the law. Here there is an imperative necessity. All—courts, judges, counsel, employers and employees in the industrial maritime field, insurers and marine underwriters—deplore the uncertainty in this problem. Recognized, of course, is the inescapable fact that from the nature of this overlapping of state and federal sovereignty, the problem at times is serious and substantial and, like Mordecai at the Gate, simply will not go away. But in those areas—rare as they might be—in which there is clarity, in which the line is clearly drawn, in which it may be said with some competent assurance that it is either one or the other, effectual enforcement of the socially desirable aim of securing a speedy determinable money indemnity under the operation of automatic self-executing[15] compensation statutes requires that

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[14] The *Jensen* problem does not arise unless there is a conjunction of (1) an injury and (2) its occurrence on navigable waters. Where the injuries occur on land or what is deemed an extension of land, the maritime law has no application at all. *State Industrial Commission* v. *Nordenholt Corp.*, 1922, 259 U.S. 263 at 275–76, 42 S. Ct. 473, 66 L. Ed. 933.

[15] We have several times outlined the self-executing nature of the Longshoremen's Act. *Flowers* v. *Travelers Ins. Co.*, *supra*, 258 F. 2d 220 at 225–27; *Atlantic & Gulf Stevedores, Inc.* v. *Donovan*, 5 Cir., 1960; 274 F. 2d 794 at 799–801; and *T. Smith & Son, Inc.* v. *Williams*, *supra*, 275 F. 2d 397 at 400, note 11.

courts have the resourcefulness to ascertain, and when ascertained, the fortitude to stand by the declaration of an identifiable line.

Such consideraions have cut a large figure in the disposition this Court has made in two well-defined areas. Where from contemporary action by state courts in the maritime states of this Circuit the pre-existing certainty was imperiled by the beguiling appeal of a free-wheeling election or the assertion that what had been clear was now Twilight, this Court, not without some travail of its own, hewed to the line. Longshoremen, loading or unloading vessels on navigable waters were restored once and for all to the place where Jensen put them. *Noah* v. *Liberty Mutual Ins. Co., supra,* note 8. This stand has more than restored symmetry within the federal establishment of this Circuit. It has, without a doubt, been a substantial factor in the decisions of the state courts. If federal courts who are charged primarily with the immediate responsibility of elucidating the statutory and constitutional principles which inhere in this acute problem of federalism stand fast, it encourages, if not assures, a cohesive, consistent, harmonious treatment by our counterparts in the state judiciaries. Thus, for example, did the confidence in the ultimate rightness of the decision of Louisiana courts, expressed without reservation in *T. Smith & Son, Inc.* v. *Williams,* 5 Cir., *supra,* 275 F. 2d 397, turn out to be well founded. This was accomplished without the aid of the much sought for Federal injunction against prosecution in the state court of claims under the Louisiana Workmen's Compensation Act or the necessity or artful constructions of the anti-injunction statute, 28 USCA § 2283. Louisiana has now spoken in terms as positive as *Noah.* Longshoremen are not in the Twilight.

Longshoremen are in the federal area only. The Louisiana State Compensation Act may not validly apply to them. *Ellis* v. *Travelers Ins. Co.*, 1961, — La. —, 129 So. 2d 729; consolidated with *William Stepter* v. *T. Smith & Son, Inc.*, 1961, — La. — 129 So. 2d 740, affirming the Court of Appeals, 123 So. 2d 780 and 788, respectively.

Likewise, in the face of some state court decisions which we have expressly declined to approve or follow, have we spoken in positive terms as to ship repairers. A ship repairer is not in the Twilight. He is in the federal domain. The State Act may not validly apply. *Flowers* v. *Travelers Ins. Co., supra*, 258 F. 2d 220.

It may seem to be unimportant that a restricted category of workers on new construction should be classified so sharply. But it is of such stuff that the certainty so badly needed in the routine operation of any compensation program will come. The converse is true. The moment what has been thought to be daylight or dark now becomes Twilight, the whole process becomes encumbered with the collateral and disruptive controversy which comes to an end authoritatively only after a long struggle culminating in a *Noah* or a *Flowers* decision.

The Supreme Court drew the line. For those working on uncompleted vessels afloat state compensation acts may validly apply. Congress adopted that line in § 903(a). There is no shadow. There is no obscurity. There is no uncertainty. It is as clear as it was in 1922 that such injuries are for state compensation.

None of the arguments offered to overcome this simple, but positive, lesson of history in action is of any merit. The main contention is that *Grant Smith-Porter Co.* was a "maritime but local" case. Two things are then asserted. The first is that the legisla-

tive history, meager and scarce as it is on this point,[16] made no reference to the "local concern" doctrine. This rests in part on the fact that the Committee Report in its statement that maritime workers are "unfortunately * * * excluded from" state laws and that the "Supreme Court has more than once held that Federal legislation cannot, constitutionally, be enacted that will apply State laws to this occupation" cited, in addition to *Jensen*, only the two cases holding Congress could not adapt state legislation.[17] That, it is urged, demonstrates that Congress was not legislating with the other cases in mind. But the Supreme Court has not read the legislative history that narrowly (see note 11, *supra* and appended text). When reference was made to *Jensen*, Congress thought, just as do judges, courts and lawyers today, of the whole thing turned loose by that auspicious doctrine. Part of that struggle, inherently part and parcel of the compelling supremacy of the admiralty in the areas where uniformity was essential, was the reflex of that—the area in which application of local laws would not work any "material prejudice to the general maritime law," *Western Fuel Co.* v. *Garcia*, 1921, 257 U.S. 233, 42 S. Ct. 89, 66 L. Ed. 210.

That concept of maritime but local is still valid.[18] The problem is all wrapped up together. The name *Jensen* is a shorthand abbreviation that embraces all. This is manifest from the very recent declaration by

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[16] See the Senate Judiciary Committee Report, S.R. 69 Cong. 1st Sess., Vol. 3, Rep. 973, p. 916; and H.R. 1767, 69 Cong. 2nd Sess., p. 19.

[17] These were *Knickerbocker Ice Co.* v. *Stewart*, 1920, 253 U.S. 149, 40 S. Ct. 438, 64 L. Ed. 834; *State of Washington* v. *W. C. Dawson & Co.*, 1924, 264 U.S. 219, 44 S. Ct. 302, 68 L. Ed. 646, 1924 AMC 403.

[18] See note 14, *supra*.

the Court in *Kossick* v. *United Fruit Co.*, 1961, — U.S. —, — S. Ct. —, 6 L. Ed. 2d 56 at 62, — AMC —. "This brings us, then, to the remaining, and what we believe is, the controlling question: whether the alleged contract, though maritime, is 'maritime and local,' *Western Fuel Co.* v. *Garcia*, 257 U.S. 233, 242, * * * in the sense that the application of state law would not disturb the uniformity of maritime law, *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 * * *." And in the context of this compensation struggle, like language was used in *Hahn* v. *Ross Island Sand & Gravel Co.*, *supra*, 358 U.S. 272. Of *Davis* the Court said, "* * * we recognized that in some cases it was impossible to predict in advance of trial whether a worker's injury occurred in an operation which, although maritime in nature, was so 'local' as to allow state compensation laws validly to apply under the limitation of *Southern P. Co.* v. *Jensen* * * *." In view of these strong contemporary recognitions of the vitality of the maritime but local concept and our present "clear duty to consider carefully what the law is on this important and far-reaching question," *River Terminals Corp.* v. *Southwestern Sugar & Molasses Co.*, 5 Cir., 1958, 253 F. 2d 922 at 925, 1958 AMC 1534, affirmed and remanded, 1959, 360 U.S. 411, 79 S. Ct. 1210, 3 L. Ed. 2d 1334, 1959 AMC 1631; 274 F. 2d 36, 1960 AMC 2064, expressions in some of our prior cases cannot be controlling. In several it has been said or implied that the consequence of the enactment in 1927 of the Longshoremen's Act was a congressional declaration that "maritime but local" no longer applied. The reasoning essentially was that by virtue of the Longshoremen's Act "Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject matter." *Continental Casualty Co.* v. *Lawson*, 5 Cir., 1933, 64 F. 2d 802 at 805, 1933

AMC 794. At another time it was phrased this way. "No ground should be yielded to state jurisdiction in cases falling within the principle of the *Jensen* case * * *," *De Bardeleben Coal Co.* v. *Henderson, supra*, 142 F. 2d 481 at 484. But as the recent cases show without doubt, this ignores element [2], see note 9, *supra*, of the coverage clause. That was made plain in *Davis, supra*. After reviewing the unsuccessful efforts of Congress to adopt state compensation acts, it said of the Longshoremen's Act: "Here again, however, Congress made clear its purpose to permit state compensation protection whenever possible by making the federal law applicable only 'if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law.'" 317 U.S. 249 at 252-53. And *O'Rourke* and *Hahn* are fresh reminders that element [2] makes the inquiry indispensable. Moreover that inquiry, when made, ultimately has to be in the classic terms embodied in the "maritime but local" formula.[19]

This analysis disposes, at the same time, of all of the drydock or marine railway cases[20] even though

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[19] In *Davis* the formula was translated into these terms: "* * * It must be remembered that under the Jensen hypothesis, basic conditions are factual: Does the State law "interfere with the proper harmony and uniformity of maritime law?" *Davis* v. *Department of Labor, supra*, 317 U.S. 249 at 254.

[20] See from this Court: *Maryland Casualty Co.* v. *Lawson*, 5 Cir., 1939, 101 F. 2d 732, 1939 AMC 129; *Massachusetts Bonding & Ins. Co.* v. *Lawson*, 5 Cir., 1945, 149 F. 2d 853, 1945 AMC 878; *Avondale Marine Ways* v. *Henderson*, 5 Cir., 1953, 201 F. 2d 437, 1953 AMC 432, affirmed, 346 U.S. 366, 74 S. Ct. 100, 98 L. Ed. 77, 1953 AMC 1990. Also from other Circuits, *United States Casualty Co.* v. *Taylor*, 4 Cir., 1933, 64 F. 2d 521, 1933 AMC 1200, no longer followed, see *Travelers Ins. Co.* v. *McManigal*, 4 Cir., 1944, 139 F. 2d 949, 1944 AMC 377, and *Newport News Shipbuilding & Drydock Co.* v.

plausible arguments from analogy may be constructed that if a marine railway on land is within the coverage, a floating uncompleted hull should likewise be. But these cases do not overcome the categorical pre-1927 holding, adopted by Congress in § 903(a), that injuries on an uncompleted vessel afloat but still under construction may, in the words of the statute, be "validly * * * provided by state law."

Nor does *O'Rourke*, *supra*, require any different result. We pointed out in *Flowers* that this case in the resolution of some of these problems "has, in our judgment, been given altogether too little attention," 258 F. 2d 220 at 223. The case, we stated, "added the further and entirely new concept that where coverage of § 903(a) is applicable, the exclusive liability of § 905 does not depend on the nature or character of the work being done by the injured employee as long as (1) that injury occurs on navigable waters and (2) the employer is such a person 'any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States * * * .' § 902(4)." 258 F. 2d 220 at 224. But that does not come into play until it is first determined whether the case is within § 903(a) and that requires a finding under element [2], see note 9, *supra*.

As a final thrust it is then insisted that even though "maritime but local" still survives, this is a Twilight case under *Davis*. But what, apart from these very decisions of the two Deputy Commissioners affirmed by two District Courts, brings about the haze of uncertainty? It was clear enough for the Deputy Commissioner to first rule that "It has not been held that

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O'Hearne, 4 Cir., 1951, 192 F. 2d 968; *Western Boat Bldg. Co.* v. *O'Leary*, 9 Cir. 1952, 198 F. 2d 409, 1952 AMC 1639.

the work on an uncompleted vessel comes within the provisions of the Longshoremen's * * * Act." For this February 1959 declaration the Administrator acting within the confines of the Fifth Circuit had some fairly substantial, if not infallible, grounds in the expressions which we made in 1958 in *Flowers*. To acknowledge that this statement may perhaps properly be characterized as dicta does not detract from the fact that this Court in drawing the line for ship repairers thought it necessary to consider that group in contrast to those engaged in new construction and in doing so used very positive language. "In contrast to" repair of a completed vessel, we declared, "work on an uncompleted hull before it has become a ship is not under Federal coverage and is, on the contrary, under State jurisdiction: *Grant Smith-Porter Ship Co.* v. *Rohde* * * *," 258 F. 2d 220 at 222, note 5.[21]

It is surprising, indeed, that with *Grant Smith-Porter Co.* still very much alive in its 49th year and the Longshoremen's Act now in its 4th decade of operations, a thing as well settled as this has suddenly become confused. *Davis* with all of its "Theoretic illogic," 317 U.S. 247 at 259 (concurring) is, as the Court's decisions reflect, "a practical solution to a practical problem," 358 U.S. 272 at 274 (dissenting). It does not serve that function if it is used as a basis

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[21] It would be doctrinaire to quibble over the phrase "before it has become a ship" as does the Deputy Commissioner's brief in reliance on *Tucker* v. *Alexandroff*, 1902, 183 U.S. 424, 22 S. Ct. 195, 46 L. Ed. 264. In any event, in a situation involving the nature of the building of a ship, in contrast to the repair of an existing vessel, the Supreme Court sharply restricted the *Tucker* case. *Thames Towboat Co.* v. *Schooner Francis McDonald*, 1920, 254 U.S. 242 at 244, 41 S. Ct. 85, 65 L. Ed. 2d 245.

for finding new uncertainty, of creating, not solving, doubt.

It is no answer to urge that the distinction at times conceivably may produce results that are extremely fine. That is the inevitable likelihood in dealing with strict jurisdictional lines. The Constitution at times sets up a barrier at the water's edge. It probably does not make much sense from an operational standpoint that a longshoreman injured while handling one end of a bale of cotton on the dock has a state remedy only whereas his counterpart injured when the other end drops while he stands with both feet on the ship's deck must go the federal route. Nor is it any more appealing that a welder fabricating a repair fitting on the dock adjacent to a completed ship is a state case whereas a fellow welder on the ship's deck working on precisely the same fitting must look exclusively to the Longshoremen's Act.

We know by now that nothing written in this field is the last word. All it can be is "the latest word." *T. Smith & Son, Inc.* v. *Williams, supra*, 275 F. 2d 397 at 407. Until there is a further word, this Court, for one at least, has three clear-cut categories: (1) longshoremen working on a ship and (2) repairmen working on a completed vessel are under the Longshoremen's Act; (3) persons working on an uncompleted vessel afloat but under construction are covered by the state act. Thus do we afford to "these hard-working men, engaged in a somewhat hazardous employment, the justice involved in the modern principle of compensation * * *"[22] by a proceeding which is certain and swift and virtually self-executing. The congressional policy reflected in element [2] of § 903(a) has

[22] S. R. 69th Cong., 1st Sess., Vol. 3, Rep. 973, p. 916; see note 16, *supra*.

freed this remedy for these workers from the agony of case-by-case adjudication with the portentious constitutional overtones[23] involved in nearly every such claim and which, for scholars and historians may be interesting, if not decisive, but which hardly offer a solution to the pressing, immediate, urgent problem of the injured worker, his employer and its insurance carrier.

The compensation order was not in accordance with law and must be set aside, 33 USCA § 921(b).

REVERSED AND RENDERED.

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[23] This is no better illustrated than in the complex field of maritime death actions. See *Thibodeaux* v. *J. Ray McDermott & Co.*, 5 Cir., 1960, 276 F. 2d 42 at 47, note 6, and *Emerson* v. *Holloway Concrete Products Co.*, 5 Cir., 1960, 282 F. 2d 271 at 281, notes 10 and 11 (dissenting) for a summary of the shifting position and alignment of the several Justices; and see Currie, *Federalism and Admiralty, The Devil's Own Mess*, 1960, The Supreme Court Review 158; Baer, *At Sea With the United States Supreme Court*, 38 N.C.L. Rev. 307 (1960).

APPENDIX B

In the United States Court of Appeals for the Fifth Circuit

No. 18695

AVONDALE SHIPYARDS, INC., APPELLANT

v.

P. J. DONOVAN, DEPUTY COMMISSIONER, SEVENTH COMPENSATION DISTRICT, BUREAU OF EMPLOYEES' COMPENSATION, U.S. DEPARTMENT OF LABOR, AND MINUS AIZEN, APPELLEES

Appeal from the United States District Court for the Eastern District of Louisiana.

(July 13, 1961)

Before CAMERON, BROWN and WISDOM, Circuit Judges.

BROWN, *Circuit Judge:* This case presents for decision the identical question this day decided in *The Travelers Ins. Co. v. Calbeck, Deputy Commissioner*, 5 Cir., 1961, — F. 2d —, — AMC — [No. 18802], whether injuries received by a person working on an uncompleted vessel, launched and afloat but still under construction, are covered under the State or the Federal Longshoremen's Act.

The facts are not significantly different. The Employer, Avondale Marine Ways, Inc., has two large shipyards and regularly performs new construction work and repair work. Generally in the Employer's large labor force the work performed by a particular employee was primarily one rather than the other. Occasionally an employee would perform the other.

The injured employee, however, worked regularly and solely in new construction. The injuries were received on August 11, 1956, while the employee was working as a welder on an uncompleted elevated deck drilling barge. The hull had been launched July 26, 1956, but the vessel was not completed and delivered until November 17, 1956. By stipulation the barge, at the time of the accident, was 57 percent complete based both on probable dollar cost and estimated man hours of work.

Unlike the *Calbeck* case only one Award was issued here. On January 27, 1960, Deputy Commissioner Donovan entered an Award of compensation benefits under the Longshoremen's Act. This was, of course, subsequent to the two Orders of Deputy Commissioner Calbeck in the other similar case then pending before the Bureau of Employees' Compensation, but it was prior to the District Court's Order of April 20, 1960, which remanded the matter for further proceedings and resulted in a complete about-face. See note 5 in *Calbeck*, — F. 2d — at —. The uncertainty and confusion was, therefore, being generated by the two cases themselves.

As in the other case, we hold that injuries to such a worker may validly be covered by the State Compensation Act. Consequently, the Order of the Deputy Commissioner must be set aside as not in accordance with law, 33 USCA § 921(b).

This makes it unnecessary to pass on the additional contention of the Employer that payments aggregating several thousand dollars for compensation and medical expense ostensibly made under the Louisiana Act constituted such an administrative determination as to be within that aspect of *Davis* v. *Department of Labor*, 1942, 317 U.S. 249, 63 S. Ct. 225, 87 L. Ed. 246, 1942 AMC 1653.

REVERSED AND RENDERED.

APPENDIX C

JUDGMENT

Extract from the Minutes of July 13, 1961

No. 18802

THE TRAVELERS INSURANCE COMPANY AND LEVINGSTON SHIPBUILDING COMPANY

v.

C. D. CALBECK, DEPUTY COMMISSIONER, EIGHTH COMPENSATION DISTRICT FOR THE BUREAU OF EMPLOYEES' COMPENSATION, U.S. DEPARTMENT OF LABOR, ET AL.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and here rendered for the appellants, The Travelers Insurance Company and Levingston Shipbuilding Company.

JUDGMENT

Extract from the Minutes of July 13, 1961

No. 18695

AVONDALE SHIPYARDS, INC.

v.

P. J. DONOVAN, DEPUTY COMMISSIONER, SEVENTH COMPENSATION DISTRICT, BUREAU OF EMPLOYEES' COMPENSATION, U.S. DEPARTMENT OF LABOR, AND MINUS AIZEN

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and here rendered for appellant, Avondale Shipyards, Inc.

U.S. GOVERNMENT PRINTING OFFICE: 1961

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IN THE

Supreme Court of the United States

October Term, 1961

NO. 532

C. D. CALBECK, DEPUTY COMMISSIONER, EIGHTH COMPENSATION DISTRICT FOR THE BUREAU OF EMPLOYEES' COMPENSATION, U. S. DEPARTMENT OF LABOR

Petitioners

vs.

THE TRAVELERS INSURANCE COMPANY AND LIVINGSTON SHIPBUILDING COMPANY,

Respondents

AMICUS CURIAE BRIEF FOR [redacted] McGUYER IN SUPPORT OF THE APPLICATION FOR WRIT OF CERTIORARI

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SUBJECT INDEX

	PAGE
REPORTED OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION AND STATUTES INVOLVED	2-3
QUESTION PRESENTED	3
STATEMENT OF POSITION	4
REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT	4-5
ARGUMENT	5-25
CERTIFICATE OF SERVICE	26
APPENDIX "A"	27-30

LIST OF AUTHORITIES

CASES	PAGE
Avondale Marine Ways v. Henderson, 201 F.2d 437, aff. 346 U.S. 366, 74 S.Ct. 190	4, 11, 15
Calbeck v. Travelers Insurance Co., 293 F.2d 52	2
Continental Casualty Co. v. Lawson, 64 F.2d 802	4, 11, 13, 22, 23
Davis v. Department of Labor, 317 U.S. 249, 63 S.Ct. 225	5, 8, 9, 14, 15, 18, 20
DeBardeleben Coal Co. v. Henderson, 149 F.2d 853	4, 11, 12, 13, 14
Dixie Sand & Gravel Co. v. Holland, 225 F.2d 304 (C.A. 6)	4, 5
Flowers v. Travelers Insurance Co., 258 F.2d 220	19
Grant Smith Porter Ship Co. v. Rhode, 257 U.S. 469, 42 S.Ct. 157, 66 L.Ed. 321	5, 7
Hahn v. Ross Island Sand & Gravel Co., 358 U.S. 272, 79 S.Ct. 266	5, 9, 14, 15, 20
Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 40 S.Ct. 438	5
Maryland Casualty Co. v. Lawson, 101 F.2d 732	4, 11
Massachusetts Bonding & Ins. Co. v. Henderson, 149 F.2d 853	11
Newport News Shipbuilding & Dry Dock Co. v. O'Hearne, 192 F.2d 968 (C.A. 4)	5, 6
Parker v. Motor Boat Sales, Inc., 314 U.S. 334, 62 S.Ct. 221	5, 8, 11, 12, 14, 15
Pennsylvania R.R. Co. v. O'Rourke, 344 U.S. 334, 73 S.Ct. 302	5, 8, 9, 14, 15, 19, 20
Rodd v. Heartt, 21 Wall. 558, 22 L.Ed. 654	6
Southern Pacific Co. v. Jensen, 244 U.S. 205, 37 S.C. 524	5, 6, 21
The Lottawanna, 21 Wall. 558, 22 L.Ed. 654	6
Travelers Insurance Co. v. McManigal, 139 F.2d 949 (C.A. 4)	4
Washington v. Dawson, 265 U.S. 219, 44 S.Ct. 302	5
Western Boat Co. v. O'Leary, 198 F.2d 409 (C.A. 9)	4
Western Fuel Co. v. Garcia, 257 U.S. 233, 42 S.Ct. 89 (1921)	7

UNITED STATES STATUTES	
28 U.S.C.A. 1254(1) and 2101(c)	2
33 U.S.C.A. 901, et seq.	2
33 U.S.C.A. 903(a)	21

IN THE

Supreme Court of the United States

October Term, 1961

NO. _____

C. D. CALBECK, DEPUTY COMMISSIONER, EIGHTH COMPENSATION DISTRICT FOR THE BUREAU OF EMPLOYEES' COMPENSATION, U. S. DEPARTMENT OF LABOR

Petitioners

vs.

THE TRAVELERS INSURANCE COMPANY AND LEVINGSTON SHIPBUILDING COMPANY,

Respondents

MICUS CURIAE.

BRIEF FOR ~~PETITIONER~~ McGUYER IN SUPPORT OF THE APPLICATION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

REPORTED OPINIONS BELOW

The only reported opinion of the courts below is that of the Fifth Circuit Court of Appeals, which was rendered

on July 13, 1961, and is reported in 293 F. 2d 52. The opinion of the United States District Court for the Western District of Louisiana, Lake Charles Division, is appended as "Appendix A."

JURISDICTION

The judgment of United States Court of Appeals for the Fifth Circuit here sought to be reviewed was entered on July 13, 1961. On October 5, 1961, Mr. Justice Black entered an order extending the time for filing a petition for writ of certiorari to and including November 3, 1961.

The jurisdiction of this Court to review the judgment complained of by writ of certiorari is conferred by Title 28, USCA, Sections 1254(1) and 2101(c).

Constitutional Provision and Statutes Involved

Article 1, Section 8: "The Congress shall have Power . . . . to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Office thereof."

Article 3, Section 2: "The judicial Power shall extend . . . to all cases of admiralty and maritime jurisdiction."

The Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 USCA 901, et seq. provides in its pertinent parts as follows:

"Section 902. DEFINITIONS.

When used in this chapter—

(2) The term 'injury' means accidental injury or death arising out of and in the course of employment, ...

(4) The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part upon the navigable waters of the United States (including any drydock).

"Section 903. COVERAGE.

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any drydock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.

"Section 904. LIABILITY FOR COMPENSATION.

(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under Sections 907-909 of this title.

"Section 920. PRESUMPTION.

In any proceedings for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter."

QUESTION PRESENTED

Whether the Deputy Commissioner has jurisdiction under the Longshoremen's and Harbor Workers' Compensation Act to make an award of compensation benefits on the claim of the widow and children of an employee who died of an injury received in the course of his employment while engaged in the construction of an uncompleted vessel afloat on navigable waters of the United States, his employer having workers engaged in maritime work.

STATEMENT OF POSITION

This is simply a brief by the McGuyers. Isabell Scott, surviving widow of Roger D. McGuyer, and Thomas Dalton and Curtis Austin, surviving minor children of Roger D. McGuyer, in support of the Application for Writ of Certorari filed herein, they being the claimants and beneficiaries under the Compensation Orders entered by the Petitioner herein, C. D. Calbeck, Deputy Commissioner, Eighth Compensation District for the Bureau of Employees' Compensation, U. S. Department of Labor.

The McGuyers adopt, in its entirety, the Application for Writ of Certiorari filed herein by the government, and pray that the Court will consider this brief in support of granting the Writ, and if the Writ be granted, it will also consider this brief on the merits of the case.

The undisputed facts are as set out above under "Question Presented."

Reasons Relied Upon For Allowance of the Writ

1. The Court of Appeals decision reversing the District Court is contrary to its own opinions in *Continental Casualty Co. v. Lawson*, 64 F. 2d 802; *Maryland Casualty Co. v. Lawson*, 101 F. 2d 732; *De Bardeleben Coal Co. v. Henderson*, 142 F. 2d 481; *Massachusetts Bonding & Ins. Co. v. Lawson*, 149 F. 2d 853; and *Avondale Marine Ways v. Henderson*, 201 F. 2d 437, aff'd. 346 U.S. 366, 74 S. Ct. 100.

2. The Court of Appeals decision reversing the District Court is contrary to the following opinions from other Circuit Courts of Appeals, *Western Boat Co. v. O'Leary*, 198 F. 2d 409 (C.A. 9); *Travelers Ins. Co. v. McManigal*, 199 F. 2d 949 (C.A. 4); *Dixie Sand & Gravel Co. v. Hol-*

land, 225 F. 2d 304 (C.A. 6); *Newport News Shipbuilding & Dry Dock Co. v. O'Hearne*, 192 F. 2d 968 (C.A. 4).

3. The Court of Appeals decision reversing the District Court is contrary to the following opinions of this Honorable Court: *Pennsylvania R. v. O'Rourke*, 344 U.S. 334, 73 S.Ct. 302; *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 334, 62 S.Ct. 221; *Davis v. Department of Labor*, 317 U.S. 249, 63 S.Ct. 225; and *Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 272, 79 S.Ct. 266.

ARGUMENT

But for the creation and existence of the so-called "twilight zone" doctrine (also known as the "local concern" or "maritime but local" doctrine), there can be little doubt but that this case would come within the Longshoremen's and Harbor Workers' Compensation Act (33 USCA 901, et seq). *Pennsylvania R. Co. v. O'Rourke*, 344 U.S. 334, 73 S.Ct. 302.

The Fifth Circuit Court of Appeals, in reversing the District Court, held that this language of Section 903(a) of the Act precludes such a result:

> ". . . if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law."

In doing so, the Court relied on *Grant Smith-Porter Ship Company v. Rhode*, 257 U.S. 469, 42 S.Ct. 157, 66 L.Ed. 321.

The Longshoremen's & Harbor Worker's Compensation Act was born out of this Court's holding in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 37 S.Ct. 524.[1]

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[1] See also Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 40 S.Ct. 438; Washington v. Dawson, 265 U.S. 219, 44 S.Ct. 302.

In *Jensen*, this Court held that a state compensation act could not constitutionally be applied to one injured while unloading the cargo of a vessel on navigable waters because, to do so, would "work(s) material prejudice to the characteristic features of the general maritime law, (or) and interfere(s) with the proper harmony and uniformity of that law in its international and interstate relations . . ." 37 S.Ct. 529.

Supremacy of the "general maritime law" in the federal government and its courts was mandatory under the Constitution. Article 3, Sec. 2, and Article 1, Sec. 8. Logic dictated the necessity for "harmony" and "uniformity" in these matters maritime. The Lottawanna (*Rodd v. Heartt*), 21 Wall 558, 22 L.Ed. 654. Axiomatic though these concepts might be in constitutional law, the fact was that people were getting hurt in an area where there was no applicable compensation law, and hurt under circumstances where damages often were not recoverable.

By 1921, the Congress not having been able to come up with a "uniform" solution, this Court was of a mind to give some relief to these unfortunate victims of our advancing mechanical and industrial technologies.

The Court of Appeals (4th) in *Newport News Shipbuilding & Dry Dock Co. v. O'Hearne*, 192 F. 2d 968, described that trend and its later contraction as follows:

> "In that case (Travelers Ins. Co. v. McManigal, 139 F. 2d 949), we reviewed the decisions in border line cases of a maritime nature and endeavored *to show the tendency of the courts*, acting in the interest of humanity prior to the passage of the Longshoremen's Act, *to enlarge the jurisdiction of state compensation commissions by developing the 'local concern' doctrine so as to enable state commissions to make awards to*

> *injured men, and the opposite tendency, since the passage of the federal statute, to adhere more strictly to the traditional principle that admiralty jurisdiction depends upon the location of the activities involved upon navigable waters;* and we held that a workman who was killed in the construction of a drydock on a navigable river was engaged in maritime employment at a place within the admiralty jurisdiction so as to render his death compensable under the Longshoremen's Act, although the dry dock was not finished and prior to the accident water had been pumped out of the river at the site of the dock." (Emphasis added)

In *Western Fuel Co. v. Garcia*, 257 U.S. 233, 42 S.Ct. 89 (1921), the Court had before it the identical facts in *Jensen*, except that the injury had resulted in death and the question was the applicability of a state wrongful death statute. In this fact situation, the Court held the state statute could be constitutionally applied because "the subject is maritime (and) local in character. . . ." and that such application of the state statute ". . . will not work material prejudice to the characteristic features of the general maritime law nor interfere with the proper harmony and uniformity of that law in its international and interstate relations." 257 U.S. at 242.

And in *Grant Smith-Porter*[2] (1921), supra, this Court held that compensation coverage for an injury sustained on an uncompleted vessel on navigable waters *could* be provided by a state law because such "would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations. . ." 42 S.Ct. at 159. This was not to

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[2] 257 U.S. 469, 42 S.Ct. 157, 66 L.Ed. 321

say, as the Court pointed out, that "the *general admiralty jurisdiction* (does not) extend to a proceeding to recover damages resulting from a tort committed on a vessel *in process of construction* (emphasis added) when lying on navigable waters within a state. . ." 42 S.Ct. at 159.

From this small hole in the dyke, because no one was able to formulate a definitive line of demarcation, this twilight zone became an escape route for the courts and a shopping center for litigants. *Davis v. Department of Labor*, 317 U.S. 249, 63 S.Ct. 225, *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 334, 62, S.Ct. 221.

It was not until *Pennsylvania R. v. O'Rourke*[3], supra, that this Court hit upon a formula for application of Longshoremen's & Harbor Workers' Compensation Act which held out real hope that at least a partial solution of the twilight zone problem was at hand. The problem had indeed been "difficult," but it was not "impossible" of solution. The solution was so simple as to make one wonder that it had been difficult at all. Moreover, the solution offered canonical certainty in many, many situations. Both the employer and employee in most instances could easily determine coverage or non-coverage with reasonable assurance. No more forum shopping by some litigant. No more need for clairvoyance on the part of most employers. And reasonable freedom for the courts of this "perplexing problem."

The solution:

> *"The statute applies by its own terms to accidents on navigable waters when the employer has any employees engaged in maritime service."* (emphasis added) 334 U.S. 339.

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[3] 344 U.S. 334, 73 S.Ct. 302

> "Section 902(4) requires the employer to pay compensation if he has 'any' employees so engaged. *If, then, the accident occurs on navigable waters, the Act must apply if the injured longshoreman was there in furtherance of his employer's business, irrespective of whether he himself can be labeled 'maritime.'*" (emphasis added) 344 U.S. 341-2.

The Fifth Circuit Court of Appeals, in this case, rejected the *O'Rourke* solution, saying that Section 903(a) of the Act froze those injured on uncompleted vessels to relief under the state act because the *Rhode* case[1], supra, had held, before enactment of the Longshoremen's & Harbor Workers' Compensation Act, that a state *could* "validly" provide compensation in such a situation.

Before continuing, it is well to note what *Rhode* did not hold. First, it did *not* hold that admiralty jurisdiction (the very heart of the Longshoremen's and Harbor Workers' Compensation Act) did not extend to an injury on new construction afloat on navigable water. Quite the contrary. Second, it did *not* hold that work on new construction afloat on navigable waters is not "maritime employment," but only that such employment had no "direct relation to navigation or commerce." These are entirely separate and distinct concepts in maritime or admiralty law.

Returning to the Court of Appeals opinion in this case. In the first place, this notion that a pre-1927 "twilight zone" case which *permits* application of a state act *freezes* every other person similarly situated to the pattern of that case flies in the face of the holding of this Court in *Davis v. Department of Labor*, 317 U.S. 249, 63 S.Ct. 225, 87 L.Ed. 246. As this Court said in *Hahn v. Ross Island Sand & Gravel Co.*, 320 Pac. 2d 668, 358 U.S. 272, 79 S.Ct. 266:

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[1] 257 U.S. 469, 42 S.Ct. 157, 66 L.Ed. 321

> *"As to cases within this 'twilight zone,' Davis in effect gave an injured waterfront employee an election to recover compensation under either the Longshoremen's Act or the Workmen's Compensation Law of the State within which the injury occurred."* (emphasis added) 358 U.S. 273.

In the instant case, though at worst a "twilight zone" case, the Court of Appeals denied the McGuyers the "election" which the doctrine clearly embraces, and forced them, notwithstanding the election they tried to make, to take their relief under the state compensation act.

Additionally, the Court of Appeals took the election away from the McGuyers notwithstanding a clear statutory presumption of jurisdiction under the Act (33 USCA 920), and in the face of this language in the Davis case[5], supra,

> "Where there has been a hearing by the federal agency entrusted with broad powers of investigation, fact finding, determination, and award, our task proves easy. There, we are aided by the provision of the federal Act, 33 USC 920, which provides in proceedings under that act, *jurisdiction is to be 'presumed in the absence of substantial evidence to the contrary.' Fact findings of the agency, where supported by the evidence, are made final. Their conclusion that a case falls within the federal jurisdiction is therefore entitled to great weight and will be rejected only in cases of apparent error. . .*" (emphasis added) 317 U.S. 256-7.

In the second place, this notion that the exclusionary language of Section 903(a) of the Act was intended by Congress to forever freeze all pre-1927 twilight zone cases under state compensation acts is contrary to other holdings

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[5] 317 U.S. 249, 63 S.Ct. 225, 87 L.Ed. 276

by the Fifth Circuit Court of Appeals[6] as well as holdings of this Court.[7]

In *Continental Casualty v. Lawson*[8], in rejecting the contention that an injury on a marine railway more than one hundred feet inland from high-tide water did not come within the Longshoremen's Act, the Fifth Circuit Court of Appeals said:

> ". . . The question whether jurisdiction over a maritime tort could be asserted under the compensation laws of the states, or existed exclusively in admiralty, was an important one when the decisions were rendered in the Rhode, the Braud, and other similar cases referred to in Colonna's Shipyard Co. v. Lowe, supra; but *since the passage of this act the importance of that question has largely disappeared* . . . (64 F. 2d at 804)
>
> ". . . The elaborate provisions of the Act, viewed in the light of prior Congressional legislation as interpreted by the Supreme Court, leaves no room for doubt, as it appears to us, that *Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject-matter.* The liability of an employer who makes provision to secure compensation to his employees is exclusive of all other liability that might be asserted by them against him.

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[6] Continental Casualty Co. v. Lawson, 64 F. (2d) 802; Maryland Casualty Co. v. Lawson, 101 F. (2d) 732; De Bardeleben Coal Co. v. Henderson, 142 F. (2d) 481; Massachusetts Bonding & Ins. Co. v. Lawson, 143 F. (2d) 853; Avondale Marine Ways v. Henderson, 201 F. (2d) 437, aff'd, 346 U.S. 366, 74 S.Ct. 100, where Mr. Justice Burton cited two of the **Lawson** cases, supra, with approval.

[7] Avondale Marine Ways v. Henderson, 201 F. (2d) 437, aff'd, 346 U.S. 366, 74 S.Ct. 100; Parker v. Motor Boat Sales, 314 U.S. 244, 62 S.Ct. 221, 86 L.Ed. 184, 1942 AMC.

[8] 64 F. (2d) 802

> State compensation laws and this compensation law of Congress are mutually exclusive of each other. The existence of the act of 1927 must be taken into consideration and given effect in determining whether under section 3 (33 USCA Sec. 902) thereof the compensation laws of the states are valid and applicable; for *state laws cannot now validly apply to a subject-matter over which Congress has exercised its exclusive jurisdiction. . .*" (emphasis added) 64 F. 2d at 805.

In the *De Bardeleben* case[9], which followed, in point of time, this Court's decision in the *Parker*[10] case, supra, the Fifth Circuit Court of Appeals said:

> "The Parker case, supra, substantially adopts this view, and such aberrations from it as the quasi legislative decision in the Davis case appears to present is only in appearance. Another of those hard cases which make bad law, *state jurisdiction was upheld there for announced reasons* having more legislative than judicial force, and *not because of any purpose to adopt a rule contrary to that which this court had announced in the Lauson case and the Parker case that followed.* As the Parker case pointed out, it is not at all necessary now to redetermine the correctness vel non of the Jensen case or of any of the brood, hatched from it, which, teetering and wavering on the line the Jensen case had drawn between state and federal jurisdiction, drew it now on this, and now on the other, side as hard cases piled up to make bad law worse. It is sufficient to say that *Congress intended the compensation act to have a coverage co-extensive with the limits of its authority and that the provision 'if recovery . . . may not validly be provided by State law' was placed in the act not as a relinquishment of any part of the*

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[9] 142 F. (2d) 481

[10] 314 U.S. 244, 62 S.Ct. 221, 86 L.Ed. 184, 1942 AMC 1

field which Congress could validly occupy but only to save the act from judicial condemnation, by making it clear that it did not intend to legislate beyond its constitutional powers. Having in mind the confused and confusing mass of quasi legislative decisions which, as such decisions always tend to do, had rendered the law almost hopelessly uncertain, *this provision was inserted to avoid, not to provide, a new basis for further judicial trimming. In the application of the act, therefore, the broadest ground it permits of should be taken. No ground should be yielded to state jurisdiction in cases falling within the principle of the Jensen case merely because the Supreme Court, before the Federal Compensation Law went into effect, did here a little, there a little, chip and whittle Jensen down* in the mass of conflicting and contradictory decisions in which it advanced and applied the 'local concern' doctrine *to save to employees injured on navigable waters, and otherwise remediless, the remedies state compensation laws afforded them.* In short, the Federal Compensation Law now in effect, the judicial tergiversations which went on before its passage no longer have point. This is what we held in the Lawson case, what the Supreme Court held in the Parker case, supra. We adhere to that holding. The judgment was right. It is affirmed." 142 F. (2) at 483-4.

In the instant case, the Court of Appeals dismissed its language in the *Lawson*[11] case and the *De Bardeleben*[12] case, saying its "expressions in some of our prior cases cannot be controlling . . . (for) . . . as the recent cases show without doubt this ignores element [2] ("if recovery for the disability or death through workmen's compensation proc-

11 64 F. (2d) 802

12 112 F. (2d) 481

ceedings may not validly be provided by State law") . . . of the coverage clause." (293 F. 2d at 58).

So far as our research shows, this decision of the Fifth Circuit Court of Appeals stands alone, in recent years at least, on these propositions: (1) that this language of 903 (a) of the Act was intended by Congress to cede to the several states exclusive jurisdiction in all pre-1927 twilight zone situations where the federal courts had permitted the application of state compensation acts, or (2) that this language of 903(a) of the Act was intended by Congress to remove from the twilight zone doctrine all those pre-1927 situations where the federal courts had permitted the application of state compensation acts.

This repudiation of its earlier decision[13] by the Fifth Circuit Court of Appeals notwithstanding that some had been cited with approval by this Court. *De Bardeleben* in O'Rourke[14]; and two of the Lawson cases by Justice Burton in *Avondale Marine Ways v. Henderson*[15].

It seems to us clear also that the Fifth Circuit Court of Appeals, in reaching this position, also misconstrued four cases decided by this Court as being in agreement with its position. *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244, 62 S.Ct. 221, 86 L.Ed. 184, 1942 AMC 1; *Davis v. Department of Labor*, 317 U.S. 249; 63 S.Ct. 225, 87 L.Ed. 246, 1942 AMC 1653; *Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 252, 79 S.Ct. 266, 3 L.Ed. 2d 292; *Pennsylvania R. Co. v. O'Rourke*, 344 U.S. 334, 73 S.Ct. 302, 97 L.Ed. 367, 1953 AMC 237.

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[13] See footnote 6.

[14] 73 S.Ct. 302, 306 footnote 7

[15] 346 U.S. 366, 74 S.Ct. 100

As to the *Davis* case, the Court said this construction "was made plain" at p. 58). As to *O'Rourke* and *Hahn*, the Court said they were "fresh reminders . . ." thereof. (at p. 58). As to *Parker*, the Court said this Honorable Court had held that ". . . the line which the Court drew in the pre-1927 days was the line which Congress adopted in 903(a), note 9, supra" (at p. 55).

It seems to us that in the *Parker* case this Court specifically overruled the very contention for which the Fifth Circuit Court of Appeals cites it as authority. To reach the conclusion that the Court of Appeals did, one must take its quotation therefrom out of the context of the opinion. That part of the *Parker* opinion not quoted by the Court of Appeals shows clearly this Court was rejecting such a narrow construction:

> "(2) The Circuit Court (116 F. 2d 789, 793) was of the opinion that even if Armistead had acted in the course of his employment, the Longshoremen's and Harbor Workers' Act would not apply because his employment was 'so local in character' that Virginia could validly have included it under a state workmen's compensation act. This proposition cannot be rested on the ground that Armistead, hired primarily as a janitor and porter, was predominantly a nonmaritime employee. For habitual performance of other and different duties on land cannot alter the fact that at the time of the accident he was riding in a boat on a navigable river, and it is in connection with that clearly maritime activity that the award was here made. Cf. Norther Coal Co. v. Strand, 278 U.S. 142, 144, 49 S. Ct. 88, 73 L.Ed. 232; Employers' Liability Assurance Corp. v. Cook, 281 U.S. 233, 236, 50 S. Ct. 308, 309, 74 L.Ed. 823. Moreover, Section 2(4) of the Act, 33 USCA, Sec. 902(4), expressly

provides for its application to 'employees (who) are employed . . . in whole or in part, upon the navigable waters of the United States.'

"If the conclusion of the Circuit Court can be supported at all, it must be on the basis that the employment, even though maritime and therefore within an area in which Congress could have established exclusive federal jurisdiction, is nevertheless subject to state regulation until Congress has exercised its paramount power. Cf. Employers' Liability Assurance Corp. v. Cook, supra, 281 U.S., page 237, 50 S. Ct., page 309, 74 L.Ed. 823. Congress having expressly kept out of the area in which 'recovery . . . may . . .validly be provided by State law,' the argument may be made that Virginia would have been unhampered in providing for compensation here.

"*The decision of this Court in Southern Pacific Co. v. Jensen*, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086, L.R.A. 1918C, 451, Ann. Cas. 1917E, 900, *however, severs a link in this chain of reasoning. For under the holding of that case, even in the absence of any Congressional action, federal jurisdiction is exclusive and state action forbidden in an area, which, although of shadowy limits, doubtless embraces the case before us.* The basis of the decision, that Article III, Sec. 2, of the Constitution extending the judicial power of the United States 'to all cases of admiralty and maritime Jurisdiction' is tantamount to a command that no state may interfere with the harmony and uniformity of admiralty law, and that on the facts of that case recovery under a state statute would work such an interference, was rejected by four dissenting members of the Court. And when the doctrine of the Jensen case was reaffirmed in Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 40 S.Ct. 438, 64 L.Ed. 834, 11 A.L.R. 1145, and Washington v. W. C. Dawson & Co., 264 U.S. 219, 44 S.Ct. 302, 68 L.Ed. 646,

sharp disagreement was again expressed in dissenting opinions. We have not been called upon here, however, to reconsider the constitutional principles announced in those cases, and we are convinced that such a reconsideration is not necessary for disposition of the case before us.

"What we are called upon to decide is not of constitutional magnitude. For regardless of whether or not the limitation on the power of states set out in the Jensen case is to be accepted, it is not doubted that Congress could constitutionally have provided for recovery under a federal statute in this kind of situation. The question is whether Congress has so provided in this statute. The proviso of Section 3(a) aside, there would be no difficulty whatever in concluding it has. For the Act expressly includes within its ambit accidents 'arising out of and in the course of employment' in the case of employees engaged 'in maritime employment, in whole or in part, upon the navigable waters of the United States', and Armistead's death was the result of such an accident. *While the proviso of Section 3(a) appears to be a subtraction from the scope of the Act thus outlined by Congress, we believe that, properly interpreted, it is not a large enough subtraction to place this case outside the coverage which Congress intended to provide.*

* * * *

"There can be no doubt that the purpose of the Act was to provide for federal compensation in the area which the specific decisions referred to placed beyond the reach of the states. *The proviso permitting recovery only where compensation 'may not validly be provided by State law' cannot be read in a manner that would defeat this purpose. An interpretation which would enlarge or contract the effect of the proviso in accordance with whether this Court rejected or reaffirmed the constitutional basis of the*

Jensen and its companion cases cannot be acceptable. The result of such an interpretation would be to subject the scope of protection that Congress wished to provide, to uncertainties that Congress wished to avoid.

"[4] *The main impetus for the Longshoremen's and Harbor Workers' Compensation Act was the need to correct a gap made plain by decisions of this Court.* We believe that *there is only one interpretation of the proviso in Section 3(a) which would accord with the aim of Congress; the field in which a state may not validly provide for compensation must be taken, for the purposes of the Act, as the same field which the Jensen line of decisions excluded from state compensation laws.* Without affirming or rejecting the *constitutional* implications of those cases, we accept them as the measure by which Congress intended to mark the scope of the Act they brought into existence."[16]

A reading of the *Davis* case certainly does not leave it "plain" that Section 903(a) placed an iron-curtain barrier between pre-1927 twilight zone cases where the Court permitted the application of state laws and the cases that came thereafter.

On the contrary, this Court said:

" . . . (because) the line separating the scope of the two being undefined and undefinable with exact precision, marginal employment may, by reason of particular facts, fall on either side. . . .

"There is, in the light of the cases referred to, clearly a twilight zone. . . . That zone includes persons such as the decedent who are, as a matter of actual administration, in fact protected under the state compensation act.

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[16] 314 U.S. 223-5

"Faced with this factual problem we must give great—indeed, presumptive—weight to the conclusions of the appropriate federal authorities and to the state statutes themselves. *Where there has been a hearing by the federal administrative agency entrusted with broad powers of investigation, fact finding, determination, and award, our task proves easy. There we are aided by the provision of the federal act,* 33 USC, Sec. 920, 33 USCA, Sec. 920, *which provides that in proceedings under that act, jurisdiction is to be 'presumed, in the absence of substantial evidence to the contrary.'* Fact findings of the agency, where supported by the evidence, are made final. *Their conclusion that a case falls within the federal jurisdiction is therefore entitled to great weight and will be rejected only in cases of apparent error.* It was under these circumstances that we sustained the Commissioner's findings in Parker v. Motor Boat Sales, supra.

"In the instant case we do not enjoy the benefit of federal administrative findings and must therefore look solely to state sources for guidance. We find here a state statute which purports to cover these persons, and which indeed does cover them if the doubtful and difficult factual questions to which we have referred are decided on the side of the constitutional power of the state."[17]

Unlike the Fifth Circuit Court of Appeals, we read the *O'Rourke* case[18] as a beacon light of hope in a distressed area of the law. Indeed, the same Judge who wrote the opinion in this case, appeared to think rather highly of the *O'Rourke* doctrine when he wrote the opinion in *Flowers v. The Travelers Insurance*,[19] even though he seemed to

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[17] 317 U.S. 356-7

[18] 344 U.S. 334, 73 S.Ct. 302, 97 L.Ed. 367, 1953 AMC 237

[19] 258 F.(2d) 220

think Section 903(a) constituted some kind of limitation on *O'Rourke*. While *O'Rourke* may not solve all the problems of the "twilight zone," it can eliminate many of the problems by restoring the pre-1927 notion of what was "maritime" and what not. See *Rhode*[20] and the cases there cited. The test laid down for jurisdiction under the Longshoremen's Act is stated as follows:

> "We are clear, however, that the emphasis on the nature of respondent's duties here misses the mark. *The statute applies, by its own terms, to accidents on navigable waters when the employer has any employees engaged in maritime service.* . . . The Court of Appeals, we think, is in error in holding that the statute requires, as to the employee, both injury on navigable water and maritime employment as a ground for coverage by the Compensation Act."[21]

While the *Hahn*[22] case appears to be a departure from the firm language of *O'Rourke*[23], supra, that it was not discussed by either the majority or dissenting opinions is surprising, but does not necessarily lead to the conclusion that *O'Rourke* was to be abandoned by the Court so soon after giving it birth. And, in any event, the case certainly does not lead one to the conclusion that Section 903(a) prevents one obviously in the twilight zone from making his election between the alternative remedies provided by the state or federal acts. On the contrary, *Hahn* clearly preserves the choice given in *Davis*,[24] and which

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[20] 257 U.S. 469, 42 S.Ct. 157 at 158

[21] 344 U.S. at 339, 73 S.Ct. at 305

[22] 358 U.S. 252, 79 S.Ct. 266, 3 L.Ed. (2) 292

[23] 344 U.S. 334, 73 S.Ct. 302, 97 L.Ed. 367, 1953 AMC 237

[24] 317 U.S. 249, 63 S.Ct. 225, 87 L.Ed. 246, 1942 AMC 1053

choice the Fifth Circuit Court of Appeals equally clearly denies in this case.

Whatever problems *Jensen* has created, it is safe to say that its thrust and aim was to establish and preserve. A reasonable "harmony" and "uniformity" in a clearly national and international field of the law. Even the critics of *Jensen* would not now argue for a minimum of fifty different laws on the same subject in the maritime field. Such would substitute chaos for mere uncertainty.

By the time Congress enacted the Longshoremen's Act, one must concede that the aim of Congress was to enact a law that would apply "uniformly" throughout the states. Its previous experience had demonstrated that it could not adopt the many state compensation acts as a solution. To be certain that this statute would meet the test of the "uniformity" requirement of *Jensen*, what better than to say the Act should apply "if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." 33 USCA 903(a). This language not only would meet the *Jensen* test, but it would save the several states from the possibility of encroachment by the federal act upon their own compensation acts in non-maritime matters.

Such an analysis of the "intent" of Congress is certainly consistent with "the legislative history, meager and scarce as it is on this point. . . ."[25] And there is nothing in that legislative history to indicate that Congress had any intention, especially in the face of the admonitions from this Court, to attempt to cede any maritime jurisdiction to the several states by delegating to them exclusive jurisdiction in all the twilight zone cases decided before 1927.[26]

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[25] 293 F. (2d) at 57

[26] See footnote 1

To have attempted to do so would have been as unconstitutional as its prior efforts along that line had been held to be. This obviously accounts for no mention of the twilight zone cases being made throughout that legislative history.

Even if we assume that Section 903(a) of the Act means what the Fifth Circuit Court holds, it would appear abundantly clear that nevertheless a state compensation act could not "validly" apply if it would prejudice the characteristic features of the maritime law or create a lack of harmony or uniformity. We think that to apply the state act in this case does indeed prejudice the characteristic features of admiralty jurisdiction and create a lack of harmony and uniformity in the maritime law in a broad field of industrial endeavor—ship building and ship repairing.

There can be no logical distinction between work on new and old construction, and the evidence in this case[27] shows there is no difference. To attempt such a distinction is to run counter to the realities of the industry. In dealing with one of the marine-railway problems[28] (repairs on boat "on a marine railway, by means of which it had been theretofore removed . . . from the navigable waters of the Miami river"),[29] the Fifth Circuit Court said:

> "In our opinion it was not the intention of Congress to provide compensation for harbor workers *only* (emphasis supplied) while they were working on ships that had been placed on floating or graven docks and to deny compensation if the same employees happened to be repairing a vessel on a marine railway. Such

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[27] R 39-42, 45, 48-51

[28] Continental Casualty Co. v. Lawson, 84 F. (2d) 802

[29] 64 F. (2d) at 803

> workmen might have been engaged on the same day in all three classes of work, since it is not unusual in a large shipyard for employees to use all three methods of taking ships out of the water for the purpose of repairing them during the same day or even at the same time."[30]

How much less can this be true in the same shipyard where both repairs and new construction are taking place, the employees working first on one and then the other, doing the same kind of work for the same rate of pay on both?

Furthermore, why a distinction in the law between new construction of a dry dock, perhaps not even on navigable water, since being on navigable water has not been compulsory in the dry dock cases, and construction work on an uncompleted vessel afloat on navigable water?[31] Even this may be going on in the same shipyard in the circumstances stated in the *Lawson*[32] case as quoted above.

Can it be that the fortuitous circumstances of the work of the employee from moment to moment shall determine whether he shall be compensated under the federal or state compensation act?

The fallacy of the argument that a distinction between injuries on new construction and injuries on repair work does "not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or unifomity of that law."[33] is

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[30] 64 F. (2d) at 805

[31] Travelers Ins. Co. v. McManigal, 139 F. (2d) 949, U. S. Casualty Co. v. Taylor, 64 F. (2d) 521, cert. den. 260 U.S. 629

[32] 84 F. (2d) 802 at 805

[33] 257 U.S. 469 at 476; 42 S.Ct. 157 at 159

easily demonstrated in this case. The same fallacy exists as to a distinction between injuries on new construction of a dry dock and new construction on a vessel afloat on navigable waters.

Assume two identical vessels, both afloat on navigable waters. One is new construction but not completed. The other is a repair job which has required stripping the vessel down to a point of construction identical with the degree of completeness of the other. On each vessel is a welder, as was the employment of deceased here, each works for the same employer, each works both on repair and new construction at various times, each has the same wage rate, and is covered by the same insurance carrier. Also, each has a wife and two children of identical ages. Assume identical explosions occur on each vessel and each of the welders receives injuries from which he dies. By the logic of the *Rhode* case, there should be no lack of uniformity in the law as applied to the two widows. But, such would not be the case. As to one widow and children, the *Rhode* case would pay (based upon the Texas Workmen's Compensation Act as is the situation here) a maximum of Thirty-five Dollars ($35.00) per week for a total of three hundred sixty (360) weeks. Asuming no remarriage, the other widow, under the Longshoremen's and Harbor Workers' Compensation Act, would be paid Twenty-eight and 35/100 Dollars ($28.35) per week plus Twenty-four and 30/00 Dollars ($24.30) per week for the two children, or a total of Fifty-two and 65/100 Dollars ($52.65) per week. This would continue for sixteen years or for about eight hundred thirty-two (832) weeks when one child would become eighteen years of age. Until the other child reached eighteen years of age, a period of about eighty (80) weeks, she would be paid Forty and 50/100 Dollars ($40.50) per

week. Thereafter, she would still be paid Twenty-eight and 35/100 Dollars ($28.35) per week for the remainder of her life. Being thirty-four (34) years of age at the time of her husband's death, she would be fifty-two (52) when the last child became eighteen. By the Commissioner's standard ordinary table of mortality she could be expected to draw this Twenty-eight and 35-100 Dollars ($28.35) per week for roughly twenty years or for about one thousand forty (1,040) weeks.

One cannot look at the realities of these assumed facts without realizing that there is considerable lack of harmony and uniformity in the laws applied to the two widows and their children, but *no* lack of uniformity as to the facts that gave rise to each of their rights to compensation.

WHEREFORE, premises considered, the McGuyers, claimants under the Longshoremen's and Harbor Workers' Act and beneficiaries of the award of the Deputy Commissioner, pray that this Honorable Court will grant the application for writ of certiorari herein, and that on the merits, the Court will reverse and render this cause.

Respectfully submitted,

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By _____
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing brief was served upon Messrs. Cavanaugh, Hickman, Brame & Holt, 520 Weber Building, Lake Charles, Louisiana, and Mr. Louis Nelson, 319 McFaddin Building, Beaumont, Texas, Attorneys for Levingston Shipbuilding Company and The Travelers Insurance Company; and upon Mr. T. Fitzhugh Wilson, United States Attorney, P. O. Box 33, Shreveport, Louisiana, and Mr. Morton Hollander, c/o Department of Justice, Washington, D. C., Attorneys for Deputy Commissioner Calbeck, by mailing two copies to each of them.

Herman Wright

APPENDIX "A"

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

CIVIL ACTION NO. 7873

THE TRAVELERS INSURANCE COMPANY
AND
LEVINGSTON SHIPBUILDING COMPANY

v.

C. D. CALBECK, DEPUTY COMMISSIONER FOR THE EIGHTH COMPENSATION DISTRICT FOR THE BUREAU OF EMPLOYEES' COMPENSATION, U. S. DEPARTMENT OF LABOR; ISABELL SCOTT McGUYER; THOMAS DALTON McGUYER; AND CURTIS AUSTIN McGUYER

FOR PLAINTIFFS

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HUNTER, JUDGE:

McGuyer sustained a fatal injury while performing his duties as a welder aboard a drilling barge which had been launched and was afloat upon navigable waters. The barge, approximately fifty per cent complete, had not been placed in navigation. The employer, Levingston Ship Building Company, had other employees engaged in maritime employment.

The widow, in behalf of herself and her children, filed a claim pursuant to the Longshoremen's and Harbor Workers' Act for compensation by reason of the death of her husband while in the employ of Levingston.

The Deputy Commissioner at first agreed with the contention of the plaintiff (Levingston Ship Building Company and its insurer, Travelers); however, subsequently he entered a new award whereby he held the Longshoremen's and Harbor Workers' Act applicable and awarded death benefits to the widow and children of McGuyer.

This suit was instituted by the employer and its insurer to enjoin the enforcement of the award of May 13, 1960 on the ground that new construction is non-maritime

in nature, and therefore the death of deceased is compensable only under the Workmen's Compensation Act of the State of Texas. The Commissioner, defendant herein, has moved to dismiss and has filed the original report of the proceedings taken before the Deputy Commissioner on June 13, 1958, together with a certified and true copy of the compensation order filed by the Deputy Commissioner on May 13, 1959.

THE LAW

The facts are simple and not disputed. The question is one of law only and may be stated to be:

Is compensation coverage under the State (Texas) or Federal (Longshoremen's and Harbor Workers' Compensation) Act?

Travelers' position may be precisely summarized as follows: The deceased sustained his fatal injury while upon navigable waters of the United States, performing the work of a welder upon the hull of a barge that was afloat and still under construction; therefore, he was engaged at the time of his death in non-maritime work, and the State of Texas could and had validly provided a remedy which is an exclusive remedy. Plaintiff's conclusion is categorically supported by *United States Casualty Company v. Taylor, et ux*, 64 F. 2d 521, 4 C.C.A., 1933, and *Grant Smith-Porter Ship Company v. Rhode*, 42 S. Ct. 157, 257 U.S. 469, 1922.

We think the Supreme Court[1] and the Appellate Courts[2] have, by subsequent pronouncements, made it quite clear

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1 Pennsylvania R. Co. v. O'Rourke, 344 U.S. 334, 73 S.Ct. 302.

2 Dixie Sand and Gravel Corporation v. Holland, 255 F.2d 304, 6 C.C.A., 1958; Flowers v. Travelers Insurance Co., 258 F.2d 220, 5 C.C.A., 1958.

that an employee's right under the Longshoremen's Act for an injury received on navigable waters depends not upon the particular employee's status, but rather upon whether or not his employer had "any * * * employees" engaged in maritime employment.

Here, McGuyer's death arose out of and in the course of his employment, and since Levingston had other employees engaged in maritime employment, and since McGuyer's death admittedly occurred upon navigable waters of the United States, his widow and children were entitled to compensation under the Act (Sec. 902, subpara. 2, and 903a, Title 33 U.S.C.A.; *Pennsylvania R. Co. v. O'Rourke*, 344 U.S. 334, 73 S. Ct. 302; *Dixie Sand and Gravel Corporation v. Holland*, 255 F. 2d 304, 6 C.C.A., 1958; *Flowers v. Travelers Insurance Co.*, 258 F. 2d 220, 5 C.C.A., 1958.

CONCLUSION

Plaintiff's prayer for a mandatory injunction is denied. The Court has examined the record and the testimony and finds that the evidence on which the Commissioner relied amply supported his findings and required the entry of his order awarding compensation. We accept and adopt the findings of the Commissioner as being supported by substantial evidence and grant summary judgment to defendant.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, on this the 25th day of October, 1960.

EDWIN F. HUNTER
UNITED STATES DISTRICT JUDGE

FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 532

C. D. GALBRECK, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v.

THE TRAVELERS INSURANCE COMPANY AND LEXINGTON INSURANCE COMPANY,

Respondents.

BRIEF OF RESPONDENTS OPPOSING THE PETITION FOR A WRIT OF CERTIORARI

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PAGE

INDEX

Question Presented 1

Statement 2

Argument:

The Court of Appeals Decision follows the Settled Law.... 3

The Court of Appeals Decision is in accord with applicable decisions of this Court..... 5

The decision is not in conflict with the decision of another Court of Appeals on the same matter..... 9

Supporting Argument and the Texas Act..... 13

Conclusion 15

CITATIONS

Cases

Atlantic Transport Company v. *Imbrovek*, 234 U.S. 52, 58 L. Ed. 1208, 34 S. Ct. 733..... 4

Avondale Marine Ways v. *Henderson*, 346 U.S. 366 affirming 201 F. 2d 437..... 8, 9

Baskin v. *Industrial Accident Commission*, 338 U.S. 854, vacating the judgment in 89 Cal. App. 2d 632, 201 P. 2d 549..... 8, 9

Bethlehem Steel Company v. *Moores*, 335 U.S. 874, affirming 323 Mass. 162, 80 N.E. 2d 478..... 8, 9

Brown v. *Aetna Casualty & Surety Company*, 145 S.W. 2d 171 (Tex. Comm. App. 1940, opinion adopted by S. Ct.).... 13, 14

Davis v. *Department of Labor and Industries*, 317 U.S. 249 ..... 4, 6, 7, 8, 9, 11

Dixie Sand & Gravel Corporation v. *Holland*, 255 F. 2d 304 10, 12

Emmons v. *Pacific Indemnity Company*, 208 S.W. 2d 884 (Tex. S. Ct. 1948)..... 14

Flowers v. *Travelers Insurance Company*, 258 F. 2d 220, cert. denied, 359 U.S. 920..... 6

PAGE

Grant Smith-Porter Ship Co. v. *Rohde*, 257 U.S. 469 (1922, 42 S. Ct. 157) 3, 4

Great Lakes Dredge & Dock Company v. *Kierejewski*, 261 U.S. 479, 67 L. Ed. 756 (1923, 43 S. Ct. 418) 4

Hahn v. *Ross Island Sand & Gravel Company*, 358 U.S. 272 7, 8

Indemnity Insurance Company of North America v. *Marshall*, 308 S.W. 2d 174 (Beaumont Civ. App. 1957, w/e ref., n.r.e.) 14

Lee v. *Fletcher Company*, 4 F. 2d 3, (C.C.A. 3rd, 1925) 4

Millers' Indemnity Underwriters v. *Braud*, 270 U.S. 59 (1926) 4, 14

Morrison-Knudsen Co. v. *O'Leary*, 288 F. 2d 542, cert. denied 10, 11

Newport News Shipbuilding & Dry Dock Co. v. *O'Hearne*, 192 F. 2d 968 ..... 10, 11

Noah v. *Liberty Mutual Insurance Company*, 267 F. 2d 218 6

Robins Dry Dock & Repair Co. v. *Dahl*, 266 U.S. 449, 69 L. Ed. 372 (1925, 45 S. Ct. 157) 4

Travelers Insurance Company v. *McManigal*, 139 F. 2d 949 ....10, 11

U. S. Casualty Company v. *Taylor*, 64 F. 2d 521 (4th Cir., 1933; cert. denied, 290 U.S. 639) 5

Statutes

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. Section 903(a) 4, 6, 9, 10

Texas Workmen's Compensation Law: V.R.C.S., Art. 8306, §3 ..... 2, 14

Miscellaneous

Senate Bill 2415, 87th Congress, 1st Session 15

IN THE

Supreme Court of the United States

October Term, 1961

No. 532

C. D. CALBECK, DEPUTY COMMISSIONER,
BUREAU OF EMPLOYEES' COMPENSATION,
UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v.

THE TRAVELERS INSURANCE COMPANY AND
LEVINGSTON SHIPBUILDING COMPANY,

Respondents.

BRIEF OF RESPONDENTS OPPOSING THE PETITION FOR A WRIT OF CERTIORARI

Respondents, The Travelers Insurance Company and Levingston Shipbuilding Company, oppose the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on July 13, 1961 in the case of The Travelers Insurance Company and Levingston Shipbuilding Company v. C. D. Calbeck, Deputy Commissioner.

QUESTION PRESENTED

Whether the coverage provisions of Section 903(a) of the Longshoremen's and Harbor Workers' Compensation

Act allow the State of Texas to provide the exclusive remedy for an injury sustained by a Texas employee while performing the work of a welder upon the hull of a barge that was afloat upon navigable waters but still under construction.

STATEMENT

At the time of the accident made the basis of the claim of the McGuyers in the Calbeck case, the employer and the employee were covered by the Texas Workmen's Compensation Act, and the employer was a subscriber under the terms of said Act. (R. 4) The Texas Workmen's Compensation Act provides that it is the exclusive remedy for injuries sustained in the course of employment; Article 8306, § 3, Vernon's Revised Civil Statutes, 1925, as amended.[1]

After the death of the employee, the McGuyers filed claim for death benefits under the Texas Workmen's Compensation Act with the Industrial Accident Board of the State of Texas and later filed claim with the Deputy Commissioner under the Longshoremen's and Harbor Workers' Act. (R. 4) One formal hearing was held Friday, June 13, 1958, which resulted in the Compensation Order dated February 18, 1959, rejecting the claim. (R. 19-22) Thereafter, a second Compensation Order was entered July 30,

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[1] Vernon's Revised Civil Statutes of Texas, Art. 8306, §3:

> "The employes of a subscriber and the parents of minor employees shall have no right of action against their employer or against any agent, servant or employe of said employer for damages for personal injuries, and the representatives and beneficiaries of deceased employes shall have no right of action against such subscribing employer or his agent, servant or employe for damages for injuries resulting in death, *but such employes and their representatives and beneficiaries shall look for compensation solely to the association, as the same is hereinafter provided for* * * *" (Emphasis ours.)

1959, modifying the original Order to the extent of finding that the accidental injury occurred within the boundaries of Calcasieu Parish, Louisiana. (R. 23-25) The Compensation Order originating this litigation was dated May 13, 1960, awarding compensation under the Longshoremen's and Harbor Workers' Act to the claimants McGuyer. (R. 13-18)

ARGUMENT

The Court of Appeals Decision Follows the Settled Law

Under "reasons for granting the writ" Petitioners state "it (the rulings of the United States Court of Appeals for the Fifth Circuit) presents an important question in the administration of the Longshoremen's Act which affects many thousands of shipyard workers." (Petition, 9) It is noted that Petitioner does not say that the Court of Appeals "has decided an important question of Federal law which has not been, but should be, settled by this Court." (Rule 19). The obvious reason is because it is well settled that injuries upon new construction are under State Acts. *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U.S. 469 (1922).

As said in the Opinion made the basis of this Petition, per Circuit Judge Brown, "As to an occurrence of this type, has there been doubt and uncertainty in the past as to coverage? If not, what is there about contemporary developments which should now make twilight out of that which has been thought to be as clear as day or as black as night?"[2]

In passing the Longshoremen's and Harbor Workers' Act of 1927, the intent of Congress was to fill the gap left by the *Jensen* decision, and to provide the modern form of compensation for injuries or death involving maritime workers that could not be validly provided for by the sev-

[2] Petition for Writ of Certiorari, Appendix A, pages 21-22.

eral states.[3] The Act was passed in 1927 with Congress fully aware of the line of demarcation[4] that had been drawn between those injuries on navigable waters which could be covered by State Acts, *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U.S. 469 (1922), 42 S. Ct. 157 (new construction); *Millers' Indemnity Underwriters* v. *Braud*, 270 U.S. 59 (1926) (removal of submerged obstructions) and those which could not, *Atlantic Transport Company* v. *Imbrovek*, 234 U.S. 52, 58 L. Ed. 1208, 34 S. Ct. 733 (loading and unloading a vessel), *Robins Dry Dock & Repair Co.* v. *Dahl*, 266 U.S. 449, 69 L. Ed. 372 (1925), 45 S. Ct. 157, *Great Lakes Dredge & Dock Company* v. *Kierejewski*, 261 U.S. 479, 67 L. Ed. 756 (1923), 43 S. Ct. 418, *Lee* v. *Fletcher Company*, 4 F. 2d 3 (C.C.A. 3rd, 1925) (repair or reconversion of a vessel.)

This line of demarcation was recognized in Section 903(a) wherein the Act provided "but only *** if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law ***", 33 U.S.C.A. 903(a). This was said in *Davis* v. *Department of Labor and Industries*, 317 U.S. 249, at pages 252 and 253:

> "*** March 4, 1927, came the Federal Longshoremen's and Harbor Workers' Act, 33 U.S.C. §901 et seq., 33 U.S.C.A. §901, et seq. Here again, however,

[3] *Davis* v. *Department of Labor*, 317 U.S. 249, at page 255:

> "* * * The Longshoremen's Act passed with specific reference to the Jensen rule, provided a partial solution. The Washington statute represents a state effort to clarify the situation. Both of these laws show clearly that neither was intended to encroach on the field occupied by the other. * * *"

[4] *Davis* v. *Department of Labor*, 317 U.S. 249, at page 256:

> "* * * In our decision in Parker v. Motor Boat Sales, 314 U.S. 244, 62 S. Ct. 221, 86 L. Ed. 184, we held that Congress has by the Longshoremen's Act accepted the Jensen line of demarcation between state and federal jurisdiction. * * *"

> *Congress made clear its purpose to permit state compensation protection whenever possible* by making the federal law applicable only 'if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.'" (Emphasis ours)

After the passage of the Longshoremen's and Harbor Workers' Act and prior to the instant two cases, the only time the matter has been before any Federal Court was in the case before the Fourth Circuit in *U. S. Casualty Company* v. *Taylor*, 64 F. 2d 521 (4th Cir. 1933; cert. denied, 290 U.S. 639) and in which that Court readily recognized that the above noted provision of Section 903(a) excluded injuries upon new construction because workmen's compensation might be validly provided by State law.[5]

The Court of Appeals Decision Is in Accord With Applicable Decisions of This Court

The decisions below have not "decided a federal question in a way in conflict with applicable decisions of this Court", as provided by Rule 19, nor are the decisions below "con-

---

[5] 64 F. 2d 521, at page 524, the Court said:

> "We conclude * * * that the federal act is applicable only to workmen engaged in maritime employment, and that compensation under the act may lawfully be paid only in those cases in which a state has no authority to act. The phrase 'may not validly be provided by State law' obviously refers to the authority of a state to act and not to the inquiry as to whether a state has exercised its power. Congress intended to occupy only a portion of the field (the crews of ships being excepted) from which the states are excluded, and to abstain altogether from duplicating the work of the states in the field which they are permitted to enter. * * *
>
> * * *

64 F. 2d 521, at page 525:

> "It follows that the deputy commissioner was barred from awarding compensation in this case by the limitation imposed by section 903(a) of the act."

trary to the standards which this Court has applied in determining the coverage of the Longshoremen's Act," as stated in the Petition, page 9. On the contrary, the decisions below conform to the applicable decisions of this Court as did two prior decisions by the same Court, in *Flowers* v. *Travelers Insurance Company*, 258 F. 2d 220, cert. denied, 359 U.S. 290, and *Noah* v. *Liberty Mutual Insurance Company*, 267 F. 2d 218.

It is contended by Petitioners that *Davis* v. *Department of Labor*, 317 U.S. 249, rejected the applicability of that portion of Section 903(a) of the Longshoremen's and Harbor Workers' Act providing "if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law". This cannot be so, for in the *Davis* case this Court reversed the decision of the Supreme Court of Washington, which had held that the Washington Compensation Act could not apply to the injury and death of the employee involved. The opinion by Mr. Justice Black states the opposite of Petitioner's contention:

> "**** March 4, 1927, came the Federal Longshoremen's and Harbor Workers' Act, 33 U.S.C. §901 et seq., 33 U.S.C.A. §901 et seq. Here again, however, Congress made clear its purpose to permit state compensation protection whenever possible by making the federal law applicable only 'if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." (317 U.S. 252-253)

The *Davis* decision further reaffirmed the pre-existing *Jensen* line of demarcation:

> "**** In our decision in Parker v. Motor Boat Sales, 314 U.S. 244, 62 S. Ct. 221, 86 L. Ed. 184, we held that Congress has by the Longshoremen's Act accepted the

Jensen line of demarcation between state and federal jurisdiction. ****" (317 U.S. 256)

After reaffirming the *Jensen* line of demarcation and the applicability of the coverage limitation provision of Section 903(a), the *Davis* decision simply held that where the facts of the case did not fall within the pre-existing *Jensen* line of demarcation and are within a 'twilight zone' that, aided by the presumptions of constitutionality of the State Act, there was no constitutional obstacle to recovery under the Workmen's Compensation Act of the State of Washington.[6]

The latest pronouncement by this Court is in *Hahn* v. *Ross Island Sand & Gravel Company*, 358 U.S. 272. The Court again recognized the coverage limitation provision of Section 903(a) wherein in a per curiam decision it is said at page 272:

> "By its terms, the Longshoremen's and Harbor Workers' Compensation Act does not apply 'if recovery for the disability or death through workmen's compensation proceedings *may* * * * *validly be provided by State Law*.' § 3, 44 Stat. 1426, 33 U.S.C. §903(a), 33 U.S.C.A. §903(a), (emphasis supplied) * * *"

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[6] *Davis* v. *Department of Labor*, 317 U.S. 249, at page 257:

> "* * * We find here a state statute which purports to cover these persons, and which indeed does cover them if the doubtful and difficult factual questions to which we have referred are decided on the side of the constitutional power of the state."

and at page 258:

> "* * * Under all the circumstances of this case we will rely on the presumption of constitutionality in favor of this state enactment; for any contrary decision results in our holding the Washington act unconstitutional as applied to this petitioner. A conclusion of unconstitutionality of a state statute can not be rested on so hazardous a factual foundation here any more than in the other cases cited.
>
> "Giving the full weight to the presumption, and resolving all doubts in favor of the Act, we hold that the Constitution is no obstacle to the pgtitioner's recovery. * * *"

Further, the *Hahn* case recognized that the twilight zone theory of *Davis* was only applicable in cases where "it was impossible to predict in advance of trial whether a worker's injury occurred in an operation which, although maritime in nature, was so 'local' as to allow state compensation laws validly to apply under the limitations of Southern Pacific Co. v. Jensen." (358 U.S. 272-3). Also the opinion in *Hahn* recognizes that the employee's election is limited to twilight zone cases:

> "* * * Of course, the employee could not do this if the case were not within the twilight zone for then the Longshoremen's Act would provide the exclusive remedy. * * *" (358 U.S. 273).

Petitioner cites *Bethlehem Steel Company* v. *Moores*, 335 U.S. 874, affirming 323 Mass. 162, 80 N.E. 2d 478, and *Baskin* v. *Industrial Accident Commission*, 338 U.S. 854 vacating the judgment in 89 Cal. App. 2d 632, 201 P. 2d 549. (Petition, page 12). But in each of these cases this Court recognized recovery under the state law. In *Moores* case this Court affirmed the State Court's judgment awarding compensation under the Massachusetts Act, citing *Davis*. In *Baskin* this Court reversed the State Court's denial of state compensation to allow the California Court to reconsider its interpretation of *Davis* in the light of the affirmance of *Moores* case. These two cases are a clear recognition of the applicability of the State Workmen's Compensation in light of the twilight zone theory and the presumptions in favor of the constitutionality of the State statutes as stated in *Davis*.[7]

Petitioner relies upon *Avondale Marine Ways* v. *Henderson*, 346 U.S. 366. In the *Avondale* case, the 5th Circuit (201 F. 2d 437) had before it an attempt to set aside an

[7] See Note 6.

award under the Longshoremen's Act. At the time of the accident, the employee was cleaning a tank of a barge[a] that had been drawn up on a marine railway. There was no contention that the work the employee was doing was not maritime; the only contention was that a marine railway (on which the vessel is drawn out of the water) was not "any dry dock" as provided in Section 903(a) of the Longshoremen's Act.[b] The Fifth Circuit allowed recovery under the Longshoremen's Act and this Court affirmed that decision in a per curiam opinion citing *Davis*, *Baskin* and *Moores*. The concurring opinions by Mr. Justice Burton and Mr. Justice Douglas simply recognize the soundness of the holding below that a marine railway is "any dry dock" within the meaning of the Act. The affirmance by the majority of this Court in a per curiam opinion, citing *Davis*, *Moores* and *Baskin* merely recognizes that *Davis* is authority for applying the twilight zone theory to the locale of the accident as well as to the maritime character of the work.

The Decision Is Not in Conflict With the Decision of Another Court of Appeals on the Same Matter

The Petition complains that the decisions of the Fifth Circuit in the instant two cases "conflict in principle" with the decisions of three circuits. (Petition, 15) Cited are the

[a] 346 U.S. at page 366:

"* * * in that the decedent, at the time of receiving his fatal injury, was engaged in cleaning a tank of a barge * * *"

[b] *Avondale Marine Ways, Inc.* v. *Henderson*, 201 F. 2d 437, at page 438:

"* * * In short, its position was that the language, 'navigable waters of the United States, including any dry dock', as those words are used in Section 3(a) of the Act, 33 U.S.C.A. §903(a) does not extend to and include the marine railway."

llowing: *The Travelers Insurance Co.* v. *McMannis*, 139 2d 949; *Newport News Shipbuilding & Dry Dock Co.* v. *Hearne*, 192 F. 2d 968; *Morrison-Knudsen Co.* v. *O'Leary* s F. 2d 542, cert. denied; *Dixie Sand & Gravel Corporation* v. *Holland*, 255 F. 2d 304.

In *Travelers Insurance Company* v. *McMannis*, *supra* Fourth Circuit allowed the application of the Longshoremen's Act to an injury occurring on the construction a dry dock from which the water had been pumped out the time of the accident. The decision specifically recogd the maritime distinction between building a new ship l repairing a completed vessel,[1] but held this distinction analogous to the facts.[2] The decision clearly recogs that an injury may be excluded by that portion of tion 903 a) of the Act wherein it is provided "* * * but * * * if recovery for the disability or death through kmen's compensation proceedings may not validly be vided by state law * * *"[3] but simply held that the said

[1] The opinion states at 139 F. 2d 95

"* * * An analogy is drawn with the historic distinction which the courts have made between work performed in the building of a ship which is not considered maritime and work upon a completed ship which partakes of this character. See Frankel v. Bethlehem-Fairfield Ship Yard, 4 Cir., 132 F. 2d 644, United States Casualty Co. v. Taylor, 4 Cir., 64 F. 2d 521."

[2] 139 F. 2d 949 at page 952

"It is not material that in the pending case the drydock was not finished. Not only was the locality within the maritime jurisdiction, but the work was maritime in its nature. We do not think that a distinction should be drawn in this respect between an unfinished and a finished structure in analogy to the distinction between a completed ship and one in the course of construction. * * *"

[3] 33 U.S.C.A., Section 903 (a).

provision was not applicable to the facts of the case.[14] Obviously the *McManigal* case was merely a twilight zone case following *Davis* v. *Department of Labor* and so recognized by the Fourth Circuit with extensive quotations from *Davis*.[15]

In *Newport News Shipbuilding & Dry Dock Co.* v. *O'Leary*, *supra*, the Fourth Circuit decision merely held that an injury received while repairing a dry dock that was in another dry dock for repairs was compensable under the Longshoremen's Act because the repair of a dry dock was just as much a maritime service as the repair of a vessel. The decision again recognized coverage limitation contained in Section 903(a) of the Act and said "we hold that the case falls within the purview of the Federal statute and *outside the permissible scope of the state enactment*. (Emphasis ours.) 192 F. 2d 968, 971.

In *Morrison-Knudsen Co.* v. *O'Leary*, *supra*, there was involved the drowning of a worker who was using a boat on the waters of a tunnel which tunnel had been used to divert the water of a navigable stream, and the Ninth Circuit merely held that the evidence before the Commissioner was sufficient to support his findings of both maritime employment[16] and navigable waters.[17]

[14] The Court said in 139 F. 2d 949, at pages 952-953:

"This discussion disposes of the argument that the whole matter was one of local concern within the jurisdiction of the State Commission and therefore excluded from the jurisdiction of the federal commission by the exception in §3 of the Act. * * *"

[15] The Court quotes from Davis v. Department of Labor, in 139 F. 2d 949, at pages 951-952.

[16] Maritime employment: In 288 F. 2d 542, 544:

"Under the facts herein, at the specific time and place both employer and employees were engaged in maritime employment."

[17] Navigable waters: In 288 F. 2d 542, 544:

"* * * the waters in the tunnel were at the time of the accident navigable waters of the Snake River."

In *Dixie Sand & Gravel Corporation* v. *Holland*, *supra*, the employee, at the time of the injury, was working with and acting as a night watchman, making the rounds of the employer's barges. The employee had completed the inspection of the outermost barge and on his return to shore slipped between the barges and fell into the river and drowned.[17] This was a typical maritime service. The decision of the Sixth Circuit held that there was no finding by the Deputy Commissioner expressly as to whether the deceased employee was acting in the course of his employment and remanded the case for such finding.[18]

---

[17] The Court cites the facts at 255 F. 2d 304, 306:

> "• • • On the night of November 23, 1954, Holland voluntarily told the night watchman that he would go with him when he made his eleven o'clock rounds and help check the barges before he left. • • •"

and at page 311:

> "Holland and Bowman had made their way to the outermost barge before Holland, on their return to shore, slipped between the barges and fell into the river."

[18] The Court said at 255 F. 2d 304, 309:

> "We are unable to say with any degree of certainty that the Deputy Commissioner's finding that 'the claim filed by the dependents does not come within the provisions of the Longshoremen's and Harbor Workers' Compensation Act' is, in fact an independent finding that Holland's death did not arise out of and in the course of his employment. We are unable to adequately review the ruling in this case without an express finding by the Deputy Commissioner on that issue. • • •"

and again on page 311:

> "The judgment of the District Court is vacated, and the action remanded to the District Court with instructions that it remand the action to the Deputy Commissioner for a finding by him based on all the evidence whether the decedent's death arose out of and in the course of his employment within the meaning of the Act. • • •"

SUPPORTING ARGUMENT AND THE TEXAS ACT

Respondent respectfully submits that the foregoing argument clearly shows that the decisions below only announce the settled law that the employees, employers and insurance carriers have followed for many years.

In The Travelers Insurance Company case twice Deputy Commissioner Calbeck rejected the claim of the McGuyers (R. 19, 23), and in his decision of February 18, 1959 gave as his reason "It has not been held that the work on an uncompleted vessel comes within the provisions of the Longshoremen's and Harbor Workers' Act". (R. 22) In the principal opinion in The Travelers Insurance Company case, per Circuit Judge Brown, this was recognized "as a convincing demonstration that until these two cases there was no serious contention that new construction work was covered." (Petition, Appendix A, page 24).

In the hearing in The Travelers Insurance Company case, Mr. Cecil Beeson, Personnel Manager of Levingston Shipbuilding Company, stated that he is in charge of handling the claims for injuries received at his employer's place of business; had been there for fifteen years prior to the accident made the basis of this claim; had always reported injuries on new construction to the Industrial Accident Board of the State of Texas; and that they had never refused to take jurisdiction of such injuries. (R. 53, 54).

The primary obligation to care for its employees is upon the State and the State of Texas has protected its employees with a Workmen's Compensation Act since 1913. (Acts 1913, 33rd Leg., Chap. 179, p. 429, Art. 8306, et seq., V. R. C. S. 1925). The Texas Act does not exclude from its coverage injuries occurring upon navigable waters, and the Texas Courts have allowed recovery. *Brown* v. *Aetna*

Casualty & Surety Company, 145 S.W. 2d 171, (Tex. Comm. App. 1940, opinion adopted by S. Ct.); *Emmons* v. *Pacific Indemnity Company*, 208 S.W. 2d 884 (Tex. S. Ct. 1948); *Indemnity Insurance Company of North America* v. *Marshall*, 308 S.W. 2d 174 (Beaumont Civ. App. 1957, w. o. ref., n.r.e.)

The Texas Act provides that it is the exclusive remedy, Article 8306, §3, V.R.C.S., 1925, as amended.[19]

The United States Supreme Court has recognized the applicability of the Texas Act to navigable waters and its exclusiveness in *Millers' Indemnity Underwriters* v. *Braud*, 270 U.S. 59 (1926). The Court there held that although the employee's work might be sufficiently maritime to give him other causes of action, nevertheless it was sufficiently of local concern that the State of Texas could validly compensate him and his beneficiaries by the Texas Workmen's Compensation Act, and since the Act contained a provision that it was the exclusive remedy, the employee and his beneficiaries would be limited thereto:

> "In the cause now under consideration the record discloses facts sufficient to show a maritime tort to which the general admiralty jurisdiction would extend save for the provisions of the state Compensation Act; but the matter is of mere local concern and its regulation by the state will work no material prejudice to any characteristic feature of the general maritime law. The act prescribes the only remedy; its exclusive features abrogate the right to resort to the admiralty court which otherwise would exist." 270 U.S. 64-65

Respondents respectfully submit that the Court of Appeals below in The Travelers Insurance Company case, has followed the line of demarcation between the State

[19] See Note 1.

Acts and the Longshoremen's and Harbor Workers' Act that has always existed and been recognized by the Courts, employers, their insurance carriers, employees, attorneys, and State Workmen's Compensation Boards. Any change should be by Congress if it can be done constitutionally. It is Respondents' understanding that a bill was introduced in the last session of Congress to make the Longshoremen's and Harbor Workers' Act applicable to the construction of vessels and that it was referred to the Committee on Labor and Public Welfare.[20]

[20] 87th Congress, 1st Session, S. 2415; In the Senate of the United States; August 14, 1961; Mr. Smith of Massachusetts introduced the bill; which was read twice and referred to the Committee on Labor and Public Welfare.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Ewell Strong

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement:	
1. The *Travelers Insurance* case	4
2. The *Avondale Shipyards* case	8
3. The decisions of the court of appeals	12
Summary of argument	13
Argument:	
The Longshoremen's Act covers injuries occurring upon navigable waters to employees of shipyards engaged in both the repair of existing vessels and the construction of new vessels, regardless which type of work the employee was engaged in at the moment of injury	21
A. The Longshoremen's Act applies to all injuries occurring at places within admiralty jurisdiction to employees of employers subject to the Act	23
1. The background of the Longshoremen's Act—Workmen's compensation, admiralty jurisdiction, and the "local concern" doctrine	24
2. The legislative history of the Longshoremen's Act reveals Congress' intent to provide compensation for all injuries to employees occurring at places within traditional admiralty tort jurisdiction, regardless whether the injury would also be compensable under a state workmen's compensation act by virtue of the "local concern" doctrine	31
a. The Senate hearings and passage	31

Argument—Continued
The Longshoremen's Act, etc.—Continued
b. The House hearings and passage — Page 38
c. Senate passage of the House bill — 41
d. Summary of the legislative history — 41
3. Under the controlling decisions of this Court, the Longshoremen's Act applies to all injuries occurring at places within admiralty jurisdiction whether the injury would also be compensable under a state workmen's compensation act by virtue of the "local concern" doctrine — 45
a. The decisions of this Court — 45
b. The meaning and effect of this Court's decisions — 58
4. The decisions of the courts of appeals hold that injuries within federal jurisdiction are within the coverage of the Act — 65
5. The administrative practice under the Act is inconclusive — 69
6. Section 5 of the Act does not make state compensation laws the exclusive remedy whenever they apply — 72
B. Even if coverage under the Longshoremen's Act does not extend to all injuries upon navigable waters within admiralty jurisdiction, the Act applied here because the injuries were within the "twilight zone" — 74
1. There is substantial doubt under the pre-1927 precedents whether state workmen's compensation acts, as supplementing admiralty law under the "local concern" doctrine, would apply to these cases — 74

Argument—Continued
The Longshoremen's Act, etc.—Continued
2. Since the legislative history of the Act and the post-1927 decisions of this Court, as well as of the Court of Appeals for the Fifth Circuit, provided a reasonable basis for believing that the injuries here are covered by the Longshoremen's Act, they are within the "twilight zone" of overlapping coverage ..... Page 78
Conclusion 81
Appendix 83

CITATIONS

Cases:

Ahern's Case, 247 Mass. 512, 142 N.E. 703 53
Alaska Packers Ass'n. v. Industrial Accident Commission, 276 U.S. 467 ..... 46, 48, 51
Automobile Club of Michigan v. Commissioner, 353 U.S. 180 72
Avondale Marine Ways v. Henderson, 346 U.S. 366, affirming 201 F. 2d 437 ..... 16, 18, 20, 43, 55, 56, 59, 60, 61, 63, 70, 71, 72, 73, 78
Baizley Iron Works v. Spun, 281 U.S. 222 ..... 52, 76, 77
Baltimore & P.S.B. Co. v. Norton, 284 U.S. 408 64
Baskin v. Industrial Accident Commission, 89 Cal. App. 2d 632, 201 P. 2d 549 ..... 53, 55, 56
Bethlehem Steel Co. v. Moores, 335 U.S. 874 ..... 16, 20, 55, 78
Cleveland Terminal Valley R.R. Co. v. Cleveland S.S. Co., 208 U.S. 316 ..... 29, 43
Continental Casualty Co. v. Lawson, 64 F. 2d 802 ..... 45, 79
Cope v. Valette Dry Dock Co., 119 U.S. 625 69
Crowell v. Benson, 285 U.S. 22 44
Davis v. Department of Labor, 317 U.S. 249 ..... 16, 18, 20, 23, 49, 50, 51, 52, 53, 54, 55, 56, 59, 61, 62, 70, 71, 73, 80.
De Bardeleben Coal Corp. v. Henderson, 142 F. 2d 481 ..... 45, 49, 58, 66, 79
Dixie Sand & Gravel Co. v. Hilland, 255 F. 2d 304 ..... 61, 66, 67, 68, 69
Ellis v. Travelers Ins. Co., 241 La. 433, 129 So. 2d 729 61
Flowers v. Travelers Ins. Co., 258 F. 2d 220, certiorari denied, 259 U.S. 920 ..... 58, 61, 79

Cases Continued

Gonsalves v. *Morse Dry Dock and Repair Co.*, 266 U.S. 171 — Page 30, 52, 75, 78
Grant Smith-Porter Ship Company v. *Rohde*, 257 U.S. 469 — 12, 19, 27, 28, 30, 33, 36, 41, 44, 60, 61, 64, 74, 75, 76
Great Lakes Dredge & Dock Co. v. *Kierejewski*, 261 U.S. 479 — 30, 52, 75
Hahn v. *Rock Island Sand & Gravel Co.*, 358 U.S. 272 — 52, 74
Hawkins v. *Bleakly*, 243 U.S. 210 — 25
Helvering v. *Wilshire Oil Co.*, 308 U.S. 90 — 72
Industrial Commission v. *Nordenholt Corp.*, 259 U.S. 263 — 15, 17, 28, 43, 55, 56, 60, 64, 78
Ives v. *South Buffalo Railway*, 201 N.Y. 271, 94 N.E. 431 — 24
Kaiser Co. v. *Baskin*, 340 U.S. 886 — 55, 78
Kelly v. *Summers*, 210 F. 2d 665 — 6
Knickerbocker Ice Co. v. *Stewart*, 253 U.S. 149 — 26, 27, 29, 32, 36, 47
Kossick v. *United Fruit Co.*, 365 U.S. 731 — 58
Maryland Casualty Co. v. *Lawson*, 101 F. 2d 732 — 55
Messel v. *Foundation Co.*, 274 U.S. 427 — 30, 31, 52, 77
Moore's Case, 323 Mass. 162, 80 N.E. 2d 478, affirmed *sub nom. Bethlehem Steel* v. *Moores*, 335 U.S. 874 — 53, 55, 56, 79
Morrison-Knudsen Co. v. *O'Leary*, 288 F. 2d 542, certiorari denied, 368 U.S. 817 — 61, 68, 69
Mountain Timber Co. v. *Washington*, 243 U.S. 219 — 25
Newport News Shipbuilding & Dry Dock Co. v. *O'Hearne*, 192 F. 2d 968 — 61, 66, 67, 68, 69
New York Central R. Co. v. *White*, 243 U.S. 188 — 25
Noah v. *Liberty Mutual Ins. Co.*, 267 F. 2d 218, setting aside 265 F. 2d 547 — 61
Norton v. *Vesta Coal Co.*, 63 F. 2d 165, certiorari dismissed, 291 U.S. 641 — 72
O'Donnel v. *Great Lakes Dredge & Dock Co.*, 318 U.S. 36 — 44
O'Hara's Case, 248 Mass. 31, 142 N.E. 844 — 53
Parker v. *Motor Boat Sales Co.*, 314 U.S. 244 — 45, 46, 47, 48, 49, 51
Pennsylvania R.R. Co. v. *O'Rourke*, 344 U.S. 334 — 17, 18, 56, 57, 58, 59, 61, 66, 68, 70, 71, 76
Pillsbury v. *United Engineering Co.*, 342 U.S. 197 — 64

Cases—Continued

Robins Dry Dock & Repair Co. v. *Dahl*, 266 U.S. 449 — Page 30, 52, 75, 78

Southern Pacific Co. v. *Jensen*, 244 U.S. 205 — 13, 22, 25, 26, 27, 28, 29, 32, 36, 47, 48, 49, 61

Stepter v. *T. Smith & Son, Inc.*, 241 La. 465, 129 So. 2d 740 — 61

Taylor v. *Lawson*, 60 F. 2d 165 — 70, 71

Thibodeaux v. *McDermott & Co.*, 276 F. 2d 42 — 10, 61

Thames Towboat Co. v. *The Schooner "Francis McDonald,"* 254 U.S. 242 — 28, 79

T. Smith & Son, Inc. v. *Williams*, 275 F. 2d 397 — 61

Travelers Ins. Co. v. *McManigal*, 139 F. 2d 949 — 45, 49, 58, 66, 67, 68, 69, 79

Tucker v. *Alexandroff*, 183 U.S. 424 — 69

United States v. *Matson Navigation Co.*, 201 F. 2d 610 — 44

United States Casualty Co. v. *Taylor*, 64 F. 2d 521, certiorari denied, 290 U.S. 639 — 67, 70, 71

Voris v. *Eikel*, 346 U.S. 328 — 64, 65

Washington v. *Dawson*, 264 U.S. 219 — 29, 32, 47

Western Boat Building Co. v. *O'Leary*, 198 F. 2d 409 — 45, 49, 68

Western Fuel Co. v. *Garcia*, 257 U.S. 233 — 27, 28

Constitution of the United States, art. III, sec. 2 — 14, 25

Statutes:

Act of October 6, 1917, 40 Stat. 395 — 26

Act of June 10, 1922, 42 Stat. 634 — 29

Act of June 19, 1948, 62 Stat. 496, 46 U.S.C. 740 — 29, 35

Act of June 24, 1948, 62 Stat. 602 — 65

Act of July 26, 1956, 70 Stat. 654 — 65

Act of August 23, 1958, 72 Stat. 835 — 65

Act of September 13, 1960, 74 Stat. 900 — 65

Judiciary Act of 1789 (Section 9, 1 Stat. 77) — 31

La. R.S. 23:1311 — 10

Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. 901, *et seq.*:

Sec. 2, 33 U.S.C. 902 — 2, 5, 9

Sec. 3, 33 U.S.C. 903 — 3, 12, 13, 21, 22, 37, 40, 43, 44, 46, 47, 48, 49, 56, 57, 58

Sec. 5, 33 U.S.C. 905 — 72, 73

Sec. 20, 33 U.S.C. 920 — 4, 16, 40, 50

Statutes—Continued

	Page
Texas Workmen's Compensation Act, V.R.C.S., Art. 8306, § 8	6
33 U.S.C. 906	10
33 U.S.C. 908	10
33 U.S.C. 909	6
Miscellaneous:	
67 Cong. Rec. 10608, 10614	37
68 Cong. Rec.:	
5403–5404, 5410–5414	40, 42
5900–5908	41, 42
Gilmore & Black, *Admiralty*	49, 66
Hearings before the House Judiciary Committee on S. 3170, 69th Cong., 1st Sess.	38, 39
Hearings before the Senate Judiciary Committee on S. 3170, 69th Cong., 1st Sess.	31, 32, 33, 34, 35
H.R. Rept. 1190, 69th Cong., 1st Sess.	31
H. Rept. No. 1767, 69th Cong., 2d Sess.	38, 39, 42, 43, 62
H. Rept. No. 2095, 80th Cong., 2d Sess.	65
H. Rept. No. 2067, 84th Cong., 2d Sess.	65
H. Rept. No. 2187, 86th Cong., 2d Sess.	65
H. Rept. 2287, 85th Cong., 2d Sess.	65
H. (Conf.) Rept. No. 2329, 80th Cong., 2d Sess.	65
1 Larson, *The Law of Workmen's Compensation*	24, 27
Note, *Overlapping Remedies for Injured Harborworkers: Interaction on the Waterfront*, 67 Yale L.J. 1205	66
S. Rept. No. 135, 65th Cong., 1st Sess.	26
S. Rept. No. 973, 69th Cong., 1st Sess.	15, 34, 35, 36, 42, 43
S. Rept. No. 1315, 80th Cong., 2d Sess.	65
S. Rept. No. 853, 84th Cong., 1st Sess.	65
U.S. Dept. of Health, Education, and Welfare, Public Health Service, National Office of Vital Statistics, *Vital Statistics of the United States*, 1959	6, 11

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 532

C. D. CALBECK, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

THE TRAVELERS INSURANCE CO. AND LEVINGSTON SHIPBUILDING CO.

P. J. DONOVAN, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

AVONDALE SHIPYARDS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The findings and awards of the deputy commissioners (R. 10–13, 91–94) are not reported. The opinion and order of the District Court for the Western District of Louisiana (R. 38–41) and the order of the District Court for the Eastern District of Louisiana (R. 95–96) are also not reported. The

opinions of the Court of Appeals for the Fifth Circuit (R. 43–55, 98–99) are reported at 293 F. 2d 52 and 293 F. 2d 51.

JURISDICTION

The judgments of the court of appeals were entered on July 13, 1961 (R. 56, 99–100). By order dated October 5, 1961, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including November 3, 1961 (R. 100). The petition was filed on November 3, 1961, and granted on December 18, 1961 (R. 101; 368 U.S. 946). The jurisdiction of this Court rests upon 28 U.S.C. 1254.

QUESTION PRESENTED

Whether injuries sustained by employees working on vessels under construction and afloat upon navigable waters are excluded from the coverage of the Longshoremen's and Harbor Workers' Compensation Act because recovery for such injuries may be had under a state workmen's compensation law.

STATUTES INVOLVED

The Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. 901, *et seq.*, provides in pertinent part (as it appears in the United States Code):

> § 902 [Section 2 of the Act]. *Definitions.*
>
> When used in this chapter—
>
> * * * * *
>
> (2) The term "injury" means accidental injury or death arising out of and in the course of employment * * *.
>
> * * * * *

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock).

* * * * *

§ 903 [Section 3 of the Act]. *Coverage.*

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

§ 920 [Section 20 of the Act]. *Presumptions.*

In any proceeding for the enforcement of a claim for compensation under this chapter it

shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter.

* * * * *

STATEMENT

These cases involve claims for compensation under the Longshoremen's and Harbor Workers' Compensation Act [1] for injuries to employees of employers covered by the Act, sustained upon navigable waters while the employees were working on vessels under construction and afloat upon navigable waters. The facts were found by the Deputy Commissioner in each case and are not in dispute.

1. *The Travelers Insurance Case.*—The Levingston Shipbuilding Company owns and operates a shipyard on the Sabine River, a navigable body of water, between Orange, Texas, and Calcasieu Parish, Louisiana (R. 15, 19, 28). The work at the shipyard consists both of building new vessels and repairing completed vessels (R. 29–30). The employees at the yard perform both kinds of labor, frequently working on a repair project on one day and upon the construction of a new vessel the next (R. 30). Since Levingston Shipbuilding Company had employees engaged in maritime employment upon navigable waters, it was an employer subject to the provisions of the Long-

[1] 33 U.S.C. 901, *et seq.*, often referred to as "the Longshoremen's Act."

shoremen's Act (33 U.S.C. 902(4), *supra*, p. 9) (R. 10–11, 15). Its liability under that Act was insured by the Travelers Insurance Company (R. 10–11).

Roger McGuyer was engaged by the employer as a welder at an average wage of $81 a week. Like the other welders, and like the shipfitters, helpers, laborers, electricians, painters and other craftsmen and apprentices, he was expected to use his skill both to repair completed vessels and to complete unfinished vessels (R. 11, 30, 31–34). The work of each of the craftsmen is basically the same whether the vessel is being repaired or is being completed (R. 34).

On July 8, 1957, McGuyer was working on the Louisiana side of the shipyard aboard an uncompleted drilling barge. The barge had been launched and was floating on the navigable waters of the Sabine River, while its superstructure was under construction (R. 10–11). While he was welding on the port side barge's deck, an accumulation of gases in a tank forty feet away exploded, throwing a bucket through the air which struck him and caused severe head injuries and fractured both arms and both legs (R. 11). On July 16, 1957, he died from a cerebral concussion which resulted from the accident (R. 11). McGuyer was survived by three dependents, his wife, who was then almost thirty-four, and two infant sons, who were aged twenty months and one month, respectively (R. 11–12).

Although the employer was not given written notice of the injury and death within thirty days, he had actual knowledge of the facts and was not prejudiced

in any way by the absence of written notice (R. 11). In accordance with the provisions of the Longshoremen's Act, the employer had furnished McGuyer with medical care from the date of his injury until the date of his death (R. 11). The employer and insurance carrier also paid the McGuyers $153.57 under the Texas Workmen's Compensation Act (R. 12).

The state workmen's compensation act applicable to McGuyer's death would probably be that of Texas, although the injury occurred within Louisiana. See *Kelly* v. *Summers*, 210 F. 2d 665, 673 (C.A. 10). The Texas Workmen's Compensation Law provides that the maximum compensation for death is $35 a week for a period of 360 weeks, or a gross amount of $12,600. V.R.C.S., Art. 8306, § 8. The Longshoremen's Act, however, provides *maximum* benefits for an employee's death of two-thirds of the employee's average wages (33 U.S.C. 909). Since McGuyer had two children, his wife and children would receive $52.65 per week under the Act (R. 12) (33 U.S.C. 909). More specifically, each of the two children would receive $12.15 a week for the sixteen-year and eighteen-year periods while the children were under eighteen, and Mrs. McGuyer would receive $28.35 a week for the years of her widowhood—which if she did not remarry and lived her normal life expectancy would be for forty-two years[2] (R. 12). Accordingly, the

[2] Mrs. McGuyer, who was almost thirty-four at the time of her husband's death, had a life expectancy of approximately forty-two years. U.S. Dept. of Health, Education, and Welfare, Public Health Service, National Office of Vital Statistics, *Vital Statistics of the United States*, 1959, Section 5, "Life Tables," pp. 5-6.

amount due for McGuyer's death would be approximately $83,500, which is 6.6 times more than the sum recoverable under the Texas Workmen's Compensation Law.[3]

Mrs. McGuyer filed a formal claim for compensation under the Longshoremen's Act, after having filed a claim under the Texas Workmen's Compensation Act which was expressly subject to the claim filed under the federal law (R. 3). At the hearing before the Deputy Commissioner, the employer conceded the employee-employer relationship, the injury upon navigable waters in the course of employment, and all the other facts imposing liability, except the coverage of the Longshoremen's Act and the identity of the beneficiaries (R. 26). After a full hearing the Deputy Commissioner found the facts as set forth above, except that he found that the injury had occurred in Texas (R. 15–16). He rejected the claims on the ground that (R. 16):

> It has not been held that the work on an uncompleted vessel comes within the provisions of the Longshoremen's and Harbor Workers' Act.

The McGuyers instituted suit for judicial review in the District Court for the Eastern District of Texas. Upon a motion to dismiss, the case was remanded to the Deputy Commissioner for reconsideration as to the place of the injury. Upon remand, the parties stipulated that the injury occurred in

[3] In our petition for certiorari (p. 6), we accepted the computation made by Mrs. McGuyer's counsel in the court of appeals. However, that computation understated the amount due.

Louisiana, and the Deputy Commissioner modified his original award to reflect that fact (R. 18–19).

The McGuyers then brought suit for review in the District Court for the Western District of Louisiana. After various procedural motions, the Deputy Commissioner filed an answer on January 11, 1960, admitting the allegations of the complaint and asking that the case be remanded (Civil Action No. 7507, W.D. La.). On April 20, 1960, the district court granted the motion and remanded the case to the Deputy Commissioner "to permit him to make findings and conclusions in accordance with the facts and the law" (R. 10).

Upon remand, the Deputy Commissioner entered a new order, reciting the facts and making an award of compensation under the Longshoremen's Act to the McGuyers (R. 10–13). The benefits awarded were $28.35 per week to the widow during widowhood, and $12.15 per week for each child until the age of eighteen, plus disability and funeral benefits, less the amount already paid under the Texas Act (R. 12–13).

The employer and the insurance carrier brought suit for judicial review in the District Court for the Western District of Louisiana. Upon motions for judgment on the administrative record, the district court rendered a short opinion, upholding the award and the coverage of the Longshoremen's Act upon the basis of decisions of this Court and the courts of appeals (R. 38–40).

2. *The Avondale Shipyards case.*—Avondale Marine Ways, Inc. (the predecessor to Avondale Shipyards, Inc., the respondent here), operated two shipyards near

New Orleans, Louisiana, where it built and repaired vessels. At the Harvey yard, the principal work was repairing completed vessels. At the Avondale yard, which is located on the Mississippi River, the greater part of the work consisted of fabrication of machinery and structural steel and the construction of new vessels, but repair work was also performed there (R. 87). Since it had employees in both plants engaged in maritime employment upon navigable waters, Avondale Marine Ways was an employer subject to the provisions of the Longshoremen's Act (33 U.S.C. 902(4)), and was qualified as a self-insurer under that Act (R. 91–92).

Minas Aizen was hired by Avondale as a tack welder in December 1955, having previously worked for the firm during the second half of 1952 (R. 92). His average weekly wage was $89.32 (R. 93). Although he worked on the construction of new vessels from December 1955 until August 1956, it was the practice of the yard to assign workers who were principally engaged in new construction to repair projects when their services were required in such work (R. 87–88).

On August 11, 1956, Minas Aizen was engaged in welding work upon an oil drilling barge intended for use in offshore operations. The barge had been launched and had been towed to a fitting dock, where she was floating on the navigable waters of the Mississippi River; she had not been completed (R. 92). When Aizen placed an "eye-lug welded to pipe" in a position for welding with a "come-along", the "eye-lug" broke and caused a piece of steel to strike him

on the head, knocking him off the scaffold onto the deck of the barge below, and then into the river (R. 76–77). He suffered a fractured skull, brain damage, a broken right forearm, left wrist, arm, and hip, and also body contusions (R. 77, 83). As a result of these injuries, Aizen became totally and permanently disabled (R. 93).

Avondale had immediate knowledge of the accident and so was not prejudiced by Aizen's failure to file written notice within the prescribed thirty-day period (R. 89, 93). Avondale furnished Aizen with all medical, surgical, and hospital treatment necessary, at an expense of approximately $7,000 (R. 89). Avondale also paid Aizen $35 a week by checks which indicated that they represented payments under the Louisiana State Workmen's Compensation Act, plus additional periodic checks in varying amounts for a total of $3,830, or an average of approximately $21.30 a week, which checks were marked "advance on compensation" (R. 89–90, 93). These payments were made without any claim being filed by Aizen with any agency of the State of Louisiana.[4]

The maximum payment for total disability for Aizen under the Louisiana Workmen's Compensation Act would be $35 a week, for a period of 400 weeks, or a total amount of $14,000. La. R.S. 23: 1202, 1221. Under the Longshoremen's Act, however, he was entitled to $54 a week for life. 33 U.S.C. 906(b), 908

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[4] Claimants under the Louisiana Workmen's Compensation Act may assert their claims in a judicial proceeding without any prior administrative proceeding. La. R.S. 23: 1311; *Thebodeaux* v. *McDermott & Co.*, 276 F. 2d 42, 48 (C.A. 5).

(a). Since he was twenty-five years old at the time of his injury, he could expect to receive $54 a week for approximately forty-eight years,[5] for a total of $134,784, or more than 9.6 times the amount receivable under the state act.[6]

Aizen filed his formal claim for compensation under the Longshoremen's Act on November 7, 1958 (R. 76–78). Avondale conceded all of the elements of liability, except that the injury was covered by the Longshoremen's Act (R. 78–79). Avondale subsequently urged that, by receiving the checks, Aizen had elected to receive compensation under the state act (R. 69). The facts were submitted to the Deputy Commissioner in the form of a stipulation by the parties (R. 86–90). Upon those facts, the Deputy Commissioner, on January 27, 1960, ruled that the claim was within the coverage of the federal Act, and awarded Aizen compensation at the maximum rate of $54 a week plus medical benefits, less the amounts which the employer had already paid (R. 91–94).

Avondale brought suit in the District Court for the Eastern District of Louisiana for review of this award. Upon motions for judgment and the administrative record, the district court entered judgment without opinion in favor of the employee and Deputy Commissioner (R. 95–96).

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[5] U.S. Dept. of Health, Education, and Welfare, Public Health Service, National Office of Vital Statistics, *Vital Statistics of the United States*, 1959, Section 5, "Life Tables," pp. 5–6.

[6] In our petition for certiorari (p. 6), we erroneously computed his compensation on the basis of a life expectancy of only forty years.

3. *The Decisions of the Court of Appeals.*—The Court of Appeals for the Fifth Circuit reversed the judgments in both cases. In its principal opinion in the *Travelers Insurance* case, the court of appeals held that, although longshoremen working on a ship and repairmen working on a completed vessel are covered by the Longshoremen's Act, "persons working on an uncompleted vessel afloat but under construction" are covered only by state workmen's compensation laws (R. 55). The court emphasized that Section 903(a) of the Longshoremen's Act (*supra*, p. 3) provides that compensation thereunder "shall be payable * * * only if * * * recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law" (R. 46). It stated that, five years before the enactment of the Longshoremen's Act in 1927, this Court, in *Grant Smith-Porter Ship Company* v. *Rohde*, 257 U.S. 469, held that a State "could provide workmen's compensation to a person injured while working on an uncompleted vessel then under construction and afloat in navigable waters," and that "the line which the Court drew in the pre–1927 days" between "uncompleted construction versus repair of a completed vessel" "was the line which Congress adopted in § 903(a) * * *" (R. 46, 47; see R. 50). In Section 903(a), the Court said, Congress "adopted" the "categorical pre-1927 holding * * * that injuries on an uncompleted vessel afloat but still under construction may, in the words of the statute, be 'validly * * * provided by state law'" (R. 53).

SUMMARY OF ARGUMENT

The employees, who worked in shipyards which both repaired and constructed vessels, were injured while working on navigable waters upon a vessel which were launched but not yet completed. We submit that in these circumstances the Longshoremen's and Harbor Workers' Act is applicable.

A. Section 3(a) of the Longshoremen's Act provides that compensation under the Act "shall be payable * * * only if the disability or death results from an injury occurring upon the navigable waters of the United States * * * and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." The latter provision does not mean that, whenever a state workmen's statute may constitutionally be applied, the federal Act is inoperative. Instead, Section 3(a) precludes coverage under the Act only if state workmen's compensation applies by force of state law itself, and not by supplementation of federal maritime law under the so-called "local concern" doctrine. Thus, the Longshoremen's Act applies to all injuries occurring at places within admiralty tort jurisdiction to employees of employers covered by the Act and excludes only injuries occurring within state tort jurisdiction.

1. The background of the Longshoremen's Act was a series of cases decided by this Court concerning the application of state law within admiralty tort jurisdiction. In *Southern Pacific Co.* v. *Jenson*, 244 U.S. 205, the Court ruled that, in the absence of federal legislation, federal maritime law occupied the area of admiralty jurisdiction conferred upon the

federal government by Article III, Section 2, of the Constitution. The Court held that state workmen's compensation laws could not constitutionally be applied to an injury occurring upon navigable waters within admiralty jurisdiction to an employee engaged in a maritime activity, because to do so would destroy the uniformity of maritime law which the Constitution was intended to establish. Subsequently, the Court formulated the "local concern" doctrine of admiralty law which permitted recovery under state workmen's compensation laws for injuries occurring within admiralty tort jurisdiction to an employee whose activities and contract of employment were matters of "local concern," not directly related to navigation or commerce. The Court reasoned that in these circumstances the adoption of state procedures by admiralty law would not destroy the uniformity required by the Constitution. *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U.S. 469. Under the "local concern" doctrine, employees hired for the construction of new vessels could receive state workmen's compensation benefits for injuries incurred upon navigable waters arising out of such construction, but employees hired for the repair of existing vessels could not receive such benefits for injuries upon navigable waters arising out of repair work. And the Court held that state workmen's compensation could be provided by direct operation of state law for injuries occurring on extensions of land into navigable waters, without reference to the "local concern" doctrine of maritime law, because injuries upon land and extensions of land were within the then rec-

ognized area of non-maritime state jurisdiction. *Industrial Commission* v. *Nordenholt Corp.*, 259 U.S. 263.

2. The legislative history of the Longshoremen's Act reveals Congress' intent to provide compensation for all injuries to employees occurring at places within traditional admiralty tort jurisdiction, regardless whether the injury would also be compensable under a state workmen's compensation act by virtue of the "local concern" doctrine.

As originally drafted, the Senate bill would have applied to "any employment performed on a place within the admiralty jurisdiction of the United States, except employment of local concern and of no direct relation to navigation or commerce * * *". It was thus clearly intended to exclude from coverage injuries upon navigable waters which were covered by state compensation benefits under the "local concern" doctrine. In apparent response to criticisms that the language would breed litigation and would result in various anomalies, the Senate Judiciary Committee reported a bill, which, like the bill as enacted, provided for coverage of injuries upon navigable waters if workmen's compensation benefits "may not validly be provided by State law." As the change in statutory language indicated, this limiting clause was apparently designed to exclude only injuries upon [redacted] fixed extensions of land which, although occurring upon navigable waters, were not then recognized as "within the maritime jurisdiction of the United States." S. Rept. No. 973, 69th Cong., 1st Sess., p. 16.

The House Judiciary Committee modified the Senate provision to include virtually all injuries to am-

phibious workers within maritime jurisdiction. Because of objections to the inclusion of seamen, the coverage provision was amended to its present form. But the debates indicate that this last amendment was not intended to exclude any category of injuries occurring within admiralty tort jurisdiction except those to seamen.

3. Under the controlling decisions of this Court rendered since the passage of the Longshoremen's Act, the Act applies to injuries occurring at all places within admiralty tort jurisdiction.

In *Davis* v. *Department of Labor*, 317 U.S. 249, the Court upheld an award of state workmen's compensation under the "local concern" doctrine, because of the presumption that the state law was constitutional. At the same time, the Court recognized that if the claimant had sought compensation under the federal Act he might well have come within its coverage because of the statutory presumption of coverage under the Act (Section 20). Thus, the Court in effect held that, when a worker was injured in the "twilight zone" where the federal or state laws were not clearly inapplicable, he could elect to recover compensation under either.

Applying the *Davis* decision, this Court has held that the "twilight zone" has a very broad scope and that therefore state workmen's compensation laws are applicable to an injury even though it occurred, under both the pre- and post-1927 precedents, within the area of exclusive federal jurisdiction. *E.g., Bethlehem Steel Co.* v. *Moores*, 335 U.S. 874. In *Avondale Marine Ways* v. *Henderson*, 347 U.S. 366, the Court

upheld an award under the Longshoremen's Act for an injury incurred in the repair of a vessel upon a marine railway on land 400 feet from navigable waters, despite the fact that the pre-1927 precedents were clear that state law had exclusive jurisdiction over injuries incurred in maritime activities on land or extensions of land (see *Industrial Commission* v. *Nordenholt Corp., supra*). This was a holding that an injury within traditional state jurisdiction, and therefore covered by state workmen's compensation laws under state law in itself (not under the "local concern" doctrine), with still within the "twilight zone" and covered by the Longshoremen's Act. And in *Pennsylvania R.R. Co.* v. *O'Rourke*, 344 U.S. 334, the Court held that, regardles of the nature of the individual employee's activity at the time of the accident, the Longshoremen's Act applied if the injury occurred upon navigable waters.

The court of appeals below decided that the injuries here were excluded from coverage under the Longshoremen's Act because, under the "clear" pre-1927 decisions of this Court, the activities of the employees at the moment of their injuries were within the "local concern" doctrine. Therefore, the court reasoned, the federal Act does not apply because compensation could be provided "by State law." That ruling is inconsistent with the decisions of this Court described above which sustain Longshoremen's Act coverage for injuries upon navigable waters within maritime tort jurisdiction, without regard to the "clear" pre-1927 precedents regarding the applicability of state work-

men's compensation laws or the nature of the employee's activity at the moment of his injury.

The principles announced and applied in *Davis*, *Avondale Marine Ways*, and *O'Rourke* have, as a practical matter, worked extremely well. They have provided clear guidelines to the lower courts and largely achieved the overriding legislative goal of prompt and sure relief to injured employees "without the delay and expense" entailed by litigation. On the other hand, the construction adopted by the court of appeals would breed litigation, engender anomalies, and tend to frustrate the legislative purpose of swift and certain relief.

4. Until the decisions in these cases below, the decisions of the courts of appeals uniformly held that injuries within admiralty tort jurisdiction are covered by the Longshoremen's Act. We know of no other case since the *Davis* decision in 1942 in which an employee injured upon navigable waters has been denied recovery under the Act because the nature of his employment or activity at the time of injury was a matter of "local concern" and therefore his injury could be covered by a state compensation statute.

5. The administrative practice under the Act is inconclusive. Only one prior ruling by a Deputy Commissioner denying a claim for injury to a construction worker upon navigable waters has been challenged in the courts and we have been unable to determine if any additional administrative rulings have been made. But even if the administrative practice were far clearer and stronger than it is, we

do not believe that this should prevent a change in interpretation to correct a clear error in construing the Act.

B. Even if coverage under the Longshoremen's Act does not extend to all injuries upon navigable waters, within traditional maritime tort jurisdiction, to employees of employers subject to the Act, the Act could be applied here because the injuries were within the twilight zone of overlapping state and federal coverage.

1. There is substantial doubt under the pre-1927 precedents of this Court whether state workmen's compensation acts, as supplementing admiralty law under the "local concern" doctrine, would apply to these cases. Although *Grant Smith-Porter Ship Co.* v. *Rohde*, *supra*, held that the "local concern" doctrine would sustain the application of state compensation laws for injuries upon navigable waters to employees engaged solely for the non-maritime work of constructing new ships by employers who engaged in such construction, there was no authoritative pre-1927 precedent as to whether the "local concern" doctrine would sustain such recovery if the contract of employment related to both maritime (repair) and non-maritime (construction) work. Indeed, the pre-1927 "local concern" decisions revealed only that the application of that doctrine by admiralty law required a painstaking factual analysis of the impact in any given case of state law on the uniformity required of maritime law.

2. Even if the pre-1927 precedents had "clearly" held that state compensation acts would have been ap-

their employments had a direct relationship to navigation and commerce. *Great Lakes Dredge & Dock Co.* v. *Kierejewski*, 261 U.S. 479 (jurisdiction sustained for a libel in admiralty, based on a local death act, for death occurring on navigable waters during the repair of a completed vessel); *Gonsalves* v. *Morse Dry Dock & Repair Co.*, 266 U.S. 171 (same result for death while repairing a completed vessel which was resting in a floating dry dock). Thus, these cases in effect held that, while the injuries occurred within federal admiralty jurisdiction and therefore maritime law applied, certain elements of local law could be adopted. On the other hand, the Court in *Kierejewski* carefully distinguished *Rohde* (where the worker was hired for and engaged in construction) on the ground that there "the matter was purely local," while here navigation and commerce are directly involved. Thus, the Court made clear that state workmen's compensation statutes would not be permitted by the "local concern" doctrine to apply where the worker was injured while engaged in repairs. Accord, *Robins Dry Dock & Repair Co.* v. *Dahl*, 260 U.S. 449.*

The intricacies and fine distinctions involved in the application of the "local concern" doctrine are vividly illustrated by *Messel* v. *Foundation Co.*, 274 U.S. 427, a case which was before this Court at the time that the Longshoremen's Act was being considered and passed by Congress. In that case a boilermaker's

* In *Robins* the Court held that a local scaffolding law could not validly apply where the worker was injured while engaged in repairs on a completed vessel because, unlike in *Rohde*, "[t]his matter was not of mere local concern * * * but had direct relation to navigation and commerce * * *." 266 U.S. at 457.

helper was employed to work in building new vessels and repairing completed vessels. He was aboard a steamship afloat on the Mississippi River at New Orleans, building an additional eight feet on the smokestack, when he was seriously injured by steam escaping from a pipe running from the engine room. He brought suit in the state courts for negligence under local law, and, in the alternative, for compensation under the state workmen's compensation act. The state courts denied recovery on the ground that the nature of the contract, employment, and injury rendered the injury a maritime tort, compensable only in a federal admiralty court. This Court agreed that the nature of the employment and the injury were maritime, and that the state workmen's compensation act could not apply, but ruled that the "saving to suitors" clause of the Judiciary Act of 1789 (Section 9, 1 Stat. 77) permitted a tort suit based on federal admiralty law in a state court. 274 U.S. at 433.

2. The Legislative History of the Longshoremen's Act Reveals Congress' Intent to Provide Compensation for All Injuries to Employees Occurring at Places within Recognized Admiralty Tort Jurisdiction, Regardless Whether the Injury Would Also Be Compensable under a State Workmen's Compensation Act by Virtue of the "Local Concern" Doctrine

a. The Senate Hearings and Passage.—Although there had been repeated efforts to have Congress adopt legislation which would provide longshoremen and other amphibious workers with the benefits of a federal workmen's compensation act, the pertinent history of the Longshoremen's Act begins in 1926, with

plicable in these circumstances, the decisions of this Court show that the "twilight zone" of legitimate doubt is not restricted to the pre-1927 precedents. Thus, compensation under the Longshoremen's Act has been upheld as within the "twilight zone" in a situation where, prior to 1927, it was clear that workmen's compensation benefits could validly be provided by state law. *Avondale Marine Ways* v. *Henderson, supra.* Conversely, compensation awards under state acts have been upheld, as within the "twilight zone," for injuries which, prior to 1927, would have been within the exclusive domain of federal maritime law. *Bethlehem Steel Co.* v. *Moores, supra.*

Regardless of the clarity of the precedents in 1927, the claims made here were within the area of legitimate doubt at the time the claims were made. The reasonableness of the claim that the Longshoremen's Act applied to these injuries is demonstrated by the legislative history of the Act, the previous decisions of this Court, and the decisions of the two Deputy Commissioners and two district courts below. In addition, prior decisions of the Court of Appeals for the Fifth Circuit had clearly indicated that cases within the "local concern" doctrine were nevertheless within the coverage of the Longshoremen's Act; and it was the opinion of the commentators and of other courts of appeals that an employee's election to recover Longshoremen's Act compensation for an injury upon navigable waters within admiralty tort jurisdiction would be sustained. The reasonableness of claimants' belief that they were covered by the Longshoremen's Act brings the injuries here within the "twilight zone," and, therefore,

under *Davis* v. *Department of Labor*, *supra*, the awards should be sustained.

ARGUMENT

THE LONGSHOREMEN'S ACT COVERS INJURIES OCCURRING UPON NAVIGABLE WATERS TO EMPLOYEES OF SHIPYARDS ENGAGED IN BOTH THE REPAIR OF EXISTING VESSELS AND THE CONSTRUCTION OF NEW VESSELS, REGARDLESS WHICH TYPE OF WORK THE EMPLOYEE WAS ENGAGED IN AT THE MOMENT OF INJURY

The employees in these two cases worked in shipyards which both repaired and constructed vessels. The claims sought to obtain compensation under the Longshoremen's and Harbor Workers' Compensation Act for injuries sustained upon the navigable waters of the United States while working upon a vessel which was launched but not yet completed. The employers were concededly subject to the Act, and the injuries, in view of their locus, were concededly within traditional federal maritime tort jurisdiction.

The court of appeals reversed the awards of compensation made by two Deputy Commissioners and sustained by two district courts on the ground that Section 3(a) of the Act, 33 U.S.C. 903(a), *supra*, p. 3, precludes recovery. Section 3(a) provides that compensation under the Act "shall be payable * * * only if the disability or death results from an injury occurring upon the navigable waters of the United States * * * and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." The court of appeals reasoned that Congress had intended in Section 3(a) to make state compensation acts the

exclusive remedy for all injuries to which such acts were "clearly" applicable prior to passage of the federal Act in 1927; that state workmen's compensation acts were applicable, prior to the adoption of the Longshoremen's Act in 1927, under the "local concern" doctrine of admiralty to many injuries within traditional admiralty jurisdiction; and that the "local concern" doctrine made state workmen's compensation legislation "clearly" applicable to a person injured while working on an uncompleted vessel afloat on navigable waters.

The government submits, on the other hand, that Congress intended in Section 3(a) to preclude recovery under the Longshoremen's Act only for injuries beyond admiralty jurisdiction, which are directly within the jurisdiction of the State—*i.e.*, where workmen's compensation benefits are wholly provided "by State law," and not where the state law applies only by the tolerance of the admiralty. In other words, in our view, the federal law applies under these circumstances, even though the modified doctrine of *Southern Pacific Co.* v. *Jensen* would not exclude state law from this portion of the maritime jurisdiction because the matter, though maritime, was of local concern. Therefore, Section 3(a) excludes only injuries within the recognized jurisdiction of the States, such as injuries occurring on land and extension of land. Here the injuries occurred upon navigable waters and under *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, and succeeding cases, occurred within the tort jurisdiction of admiralty; therefore Section 3(a) does not bar recovery.

Accordingly, we will first show that the Longshoremen's Act, as intended by Congress and authoritatively construed by this Court, provides benefits for all injuries occurring within traditional admiralty jurisdiction to employees of employers who are subject to the Act because they have workers engaged in maritime employment on navigable waters. Alternatively, we will show—assuming, as the court of appeals held, that the Longshoremen's Act does not cover injuries within admiralty jurisdiction which prior to 1927 "clearly" would have been compensable under state workmen's compensation acts through the "local concern" doctrine—that the injuries here were not clearly within the "local concern" doctrine. Instead, since they occurred within the "twilight zone" of legitimate doubt in which both state and federal workmen's compensation acts may be applicable, they were covered by the Longshoremen's Act under the principles announced in *Davis* v. *Department of Labor*, 317 U.S. 249.

A. THE LONGSHOREMEN'S ACT APPLIES TO ALL INJURIES OCCURRING AT PLACES WITHIN ADMIRALTY JURISDICTION TO EMPLOYEES OF EMPLOYERS SUBJECT TO THE ACT

The first issue before the Court is whether the Longshoremen's Act extends to all injuries to employees of employers subject to the Act who are injured upon navigable waters within maritime jurisdiction, including injuries occurring during the construction of vessels which have been launched but not completed. We submit that the legislative history of the Act and the decisions of this Court demonstrate that the Act provides relief in these circumstances.

1. The Background of the Longshoremen's Act—Workmen's Compensation, Admiralty Jurisdiction, and the "Local Concern" Doctrine

As a result of the industrial revolution the number of injuries to workers in the course of their employment greatly increased during the nineteenth century. Because of such doctrines as the fellow-servant rule, contributory negligence, and assumption of risk, the common law provided costly, slow, and uncertain remedies for the injured workman or his survivors. When in the last decade of the nineteenth century, accounts of the German system of social insurance (adopted between 1883 and 1887) and the British Compensation Act of 1897 became available in this country, they were intensively studied and, with modifications, began to be adopted by the federal and state legislatures. See 1 Larson, *The Law of Workmen's Compensation*, §§ 4.10–5.20, pp. 23–38.

New York adopted the first comprehensive workmen's compensation act in 1910, with compulsory coverage for certain "hazardous" employments. In 1911, however, the New York Court of Appeals held the act to be in violation of the state and federal constitutions, since it provided for the imposition of liability upon the employer without fault, which was deemed to be a taking of property without due process of law.[1] *Ives* v. *South Buffalo Railway*, 201 N.Y. 271,

[1] Other state courts had reached the same result in regard to two earlier laws pertaining to miners. 1 Larson, *The Law of Workmen's Compensation*, § 5.20, p. 37. An Act providing similar benefits for certain federal employees had been adopted in 1908 (35 Stat. 556), but was apparently not subjected to constitutional attack.

94 N.E. 431. After an amendment to the New York constitution in 1913, New York reenacted the compulsory workmen's compensation law. The Act was again challenged on federal constitutional grounds, and was considered by this Court during 1916 Term together with similar challenges to a compulsory workmen's compensation act of the State of Washington, and to an elective act enacted in Iowa. By this time elective workmen's compensation laws had been adopted by the legislatures and sustained by the courts of at least eleven other states. *Hawkins* v. *Bleakly*, 243 U.S. 210, 212. Early in 1917 this Court sustained each of the acts before it as consistent with the federal constitution. *New York Central R. Co.* v. *White*, 243 U.S. 188; *Hawkins* v. *Bleakly, supra; Mountain Timber Co.* v. *Washington*, 243 U.S. 219.

During the same Term, however, the Court held unconstitutional the application of the New York Workmen's Compensation Act to an injury occurring upon a vessel afloat on navigable waters to a longshoreman engaged in unloading the cargo of a vessel. *Southern Pacific Co.* v. *Jenson*, 244 U.S. 205. The Court held that, under Article III, Section 2, of the Constitution, in the absence of some controlling federal statute, "the general maritime law as accepted by the federal courts constitutes part of our national law applicable to matters within the admiralty and maritime jurisdiction." 244 U.S. at 214–215. In other words, in the absence of federal legislation, federal maritime law was held to occupy the area within admiralty jurisdiction. While saying that "it would be difficult, if not impossible, to define with exactness

just how far the general maritime law may be changed, modified, or affected by state legislation" (*id.* at 216), the Court ruled that to permit the application of the state workmen's compensation act to the injury, which was clearly within admiralty jurisdiction, would be to destroy "the very uniformity in respect to maritime matters which the Constitution was designed to establish." *Id.* at 217. The Court therefore held that application of the New York act was unconstitutional. In opinions by Mr. Justice Holmes and Mr. Justice Pitney, four members of the Court dissented.

Later that year, Congress amended the statutory grant of admiralty jurisdiction to district courts by "saving to suitors" their rights and remedies under the workmen's compensation act of any State. Act of October 6, 1917, 40 Stat. 395. This Act was intended to confer concurrent jurisdiction on the workmen's compensation boards and the federal courts for injuries within admiralty jurisdiction, so that the injured workman or his survivors could elect either to bring a traditional action in admiralty in the federal court for the injury or to submit a claim under the state compensation act. S. Rept. No. 135, 65th Cong., 1st Sess. In 1920, however, this Court held that the Act of October 6, 1917, would destroy the harmony and uniformity which was the purpose of the constitutional grant of maritime jurisdiction, and that it was therefore an unconstitutional delegation to the state legislatures of Congressional authority. *Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149. Mr. Justice Holmes dissented in an opinion joined by three other members of the Court. At the time

of this decision, all but eight of the States had adopted workmen's compensation acts, 1 Larson, *The Law of Workmen's Compensation*, § 5.30, p. 39.

Perhaps in heed of the criticisms of the decisions in *Jensen* and *Knickerbocker Ice Co.* by the dissenting members of the Court and the commentators, the Court in its 1921 Term lessened the impact of those two cases by announcing the "local concern" or "maritime but local" doctrine, and applying state law to an injury within admiralty jurisdiction in two situations. *Western Fuel Co.* v. *Garcia*, 257 U.S. 233; *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U.S. 469. In *Western Fuel Co.* v. *Garcia*, the Court held that a state wrongful death statute could be applied to an injury to a stevedore received while he was unloading the cargo of a vessel, because "[t]he subject is maritime [but] local in character" and the modification of the law "will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law." 257 U.S. at 242. The Court upheld the application of state law to the injury occurring within admiralty jurisdiction despite the virtual identity of the facts in *Garcia* to the activity and the nature of employment involved in *Jensen*.

In *Grant Smith-Porter Smith Co.* v. *Rohde*, the Court upheld the application of the Oregon workmen's compensation act, under the "local concern" doctrine, to another injury within admiralty jurisdiction. In that case a carpenter, who had been hired by a company which built new ships, was in-

jured while engaged in making a bulkhead aboard a vessel which had been launched but not completed. He was not hired to engage in repair work, and apparently his employer only built new ships and did not repair completed ones. On certification from the Court of Appeals for the Ninth Circuit, the Court reaffirmed the established principle that admiralty jurisdiction in tort depended upon the locus of the injury and held that the injury was within admiralty jurisdiction. 257 U.S. at 476, 477–478. The Court nevertheless held that, since the employee's contract with the employer was non-maritime (see *Thames Towboat Co.* v. *The Schooner "Francis McDonald,"* 254 U.S. 242), and "neither Rohde's general employment nor his activities at the time had any direct relation to navigation or commerce" (257 U.S. at 475–476), the matter was "local" in nature. Therefore, state compensation laws could apply under the "local concern" doctrine announced in *Western Fuel Co.* v. *Garcia, supra.*[*]

In a third case decided during the same Term, the Court held that a state workmen's compensation act could validly be applied to an injury to a stevedore engaged in unloading the cargo of a vessel, since the injury had occurred on a dock which was "an extension of the land." *Industrial Commission* v. *Nordenholt Corp.*, 259 U.S. 263, 275. The activity, employment, and maritime nature of the contract were virtually identical to those in *Jensen*. The locus of the injury was the distinguishing feature: the injury occurred on the dock, rather than on the ship. Unlike *Garcia* and *Rohde*, the decision did not rest upon the

[*] We discuss the *Rohde* case in more detail, *infra*, pp. 74–76

newly evolved "local concern" doctrine but was based upon the then prevailing view of the line of demarcation between admiralty and local law which placed injuries occurring upon a dock (which was upon navigable waters) beyond admiralty jurisdiction and within the exclusive jurisdiction of state law. *Cleveland Terminal Valley R.R. Co.* v. *Cleveland S.S. Co.*, 208 U.S. 316. But see Act of June 19, 1948, 62 Stat. 496, 46 U.S.C. 740. Since maritime law did not apply, there was no conflict between it and local law, and the latter governed. 259 U.S. at 275–276.

Apparently encouraged by these decisions, Congress in the same year again adopted legislation which would have permitted the application of state workmen's compensation laws to injuries upon navigable waters to persons in maritime employment. Act of June 10, 1922, 42 Stat. 634. The new statute was similar in form and substance to the 1917 act, except that it excluded from coverage the most maritime category of employees, seamen and masters. The Court found the difference between the two acts insufficient to warrant a different result, adhered to its decisions in *Jensen* and *Knickerbocker Ice* v. *Stewart, supra,* and held that the 1922 Act was unconstitutional. *Washington* v. *Dawson,* 264 U.S. 219. The Court suggested, however, that Congress had the constitutional authority to adopt a uniform federal compensation act. *Id.* at 227–228.

The Court meanwhile applied state wrongful death statutes in cases involving injuries sustained by workers who were hired for, and were engaged in, repair work on completed vessels even though the employees were working under maritime contracts and

the introduction of S. 3170. The provisions of the bill were based upon the New York Workmen's Compensation Act. Hearings on S. 3170, Senate Judiciary Committee, 69th Cong., 1st Sess. [hereafter Senate Hearings], pp. 31–32. As originally drafted, the bill was apparently designed to provide coverage only for injuries within the admiralty jurisdiction which were not compensable under state workmen's compensation acts either applying of their own force or by supplementation of maritime law under the "local concern" doctrine. Section 3 of the bill as originally drafted read (Senate Hearings, p. 2):

> This act shall apply to any employment performed on a place within the admiralty jurisdiction of the United States, *except employment of local concern and of no direct relation to navigation and commerce;* but shall not apply to employment as master or member of the crew of a vessel. [Emphasis added.]

Even as drafted, however, the statute was intended to apply to "carpenters, to boiler makers, to electricians, to sheet-metal workers, and all mechanics who are employed in connection with repairing a ship * * *." *Id.* at p. 21.

At the Senate hearings, representatives of the International Longshoremen's Union and of unions representing other trades testified generally in support of the bill, noting that all but six of the States had workmen's compensation laws. Senate Hearings, pp. 18–44, 37. They explained the need for the bill as a result of the *Jensen*, *Knickerbocker Ice*, and *Dawson* decisions, and quoted from the latter opinion to

demonstrate that Congress had the authority under the Constitution to adopt the bill. *Id.* at p. 18. An attorney for the unions also explained that the locus of the injury was the sole test for admiralty jurisdiction and that employees working on docks were solely within the jurisdiction of the State, which could validly provide compensation for them by state law. *Id.* at pp. 30–31. On the other hand, unions representing seamen, apparently being satisfied with their remedies under the Jones Act, wished to be exempted from the provisions of the new bill. *Id.* at p. 17.

Representatives of the shipbuilding, ship repair firms, ship lines, and other employers testified in favor of the principles of the bill, but opposed some of its features. Senate Hearings, pp. 45–91. The employers were generally in favor of broad coverage for the new bill.

When the Chairman of the Judiciary Committee, Senator Cummins, questioned the meaning and scope of the exemption for "employment of local concern" and of no direct relation to navigation and commerce in Section 3, O. G. Brown, an attorney representing the Council of American Shipbuilders, stated that the exception was there because of the *Rohde* decision (allowing state workmen's compensation legislation to apply to injuries within maritime jurisdiction when the subject was of local concern (see *supra*, pp. 27–28)). He noted the parallel between the language in the bill and that in the decision. *Id.* at p. 57.

Dudley M. Holman, General Manager of the United States Mutual Liability Insurance Co., testifying on

behalf of American Shipbuilders (Inc.) and the New York and New Jersey Dry Dock Association (an association of shipyards engaged in the construction and repair of vessels), attacked Section 3 of the bill as drafted. He noted that it was difficult to determine who was covered, and Senator Cummins agreed. Senate Hearings, p. 91. Holman said that under Section 3 craftsmen of a shipyard if injured aboard a vessel which had been launched but not completed in Massachusetts would be entitled only to compensation under the state act at the rate of $16 a week, whereas if they were injured aboard a completed vessel, they would receive $25 a week. This result, he stated, was difficult to understand or justify. *Id.* at pp, 91–93.

At the close of the hearing, a formal written statement was submitted by the American Shipbuilders (Inc.) and the New York and New Jersey Dry Dock Association and was received by the Committee. Senate Hearings, pp. 95–104. After setting forth Section 3 of the bill as originally drafted, the organization noted the following objections (*id.* at p. 95):

> This provision is indefinite. The exception of 'employment of local concern and of no direct relation to navigation and commerce' is vague and will be the subject of continual litigation. Innumerable claims will become legal questions requiring determination by the courts.
>
> Instead of excepting seamen, *it should include all maritime employment under the admiralty jurisdiction* of the United States court. The burden of such legislation may then be

> properly distributed over the maritime industry. [Emphasis added.]

Failure to include "all maritime employment under the admiralty jurisdiction" would, it was suggested, breed expensive and time-consuming litigation. *Id.* at pp. 95–96.

The bill as recommended by the Senate Judiciary Committee consisted of a redraft of the original measure. S. Rept. No. 973, 69th Cong., 1st Sess., p. 1. The coverage provision, Section 3, had been entirely rewritten, apparently with a view toward meeting some of the objections made to the original bill at the hearings. As rewritten, it read in pertinent part as follows (*id.* at p. 2):

> SEC. 3. (a) Compensation shall be payable under this act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock)[10] or occurring while such employee was employed on board a vessel of the United States upon the high seas, and *if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.* No compensation shall be payable in respect to the disability or death of—

[10] Dry docks, which Section 3(a) of the Act specifically states are within the coverage of the Act, generally float on the water and are used for repair or construction of vessels. Docks, like wharves, however, do not float on the water and are used for loading and unloading vessels. Docks may be viewed either as part of navigable waters and within admiralty jurisdiction (Act of June 19, 1948, 62 Stat. 496, 46 U.S.C. 740) or as extensions of land.

> (1) A master or seamen, as defined in section 4612 of the Revised Statutes, as amended * * *. [Emphasis added.]
>
> * * * * *

Thus, the Senate committee deleted the exception for "employment of local concern and of no direct relation to navigation and commerce" (*supra*, p. 32) in the bill as originally drafted and substituted the language italicized above which does not refer to the "local concern" doctrine. Although the representatives of the shipyards had not succeeded in securing coverage for all maritime employment, since seamen were excluded, the specific "local concern" exemption had been removed. The exemption was apparently removed because of the urging of the shipyards for broader coverage for their employees, and because of their attack upon the anomaly of providing only state coverage for injury upon uncompleted vessels floating upon navigable waters, while providing federal coverage for similar injuries upon completed vessels being repaired.

The Committee's explanation of the bill was brief and general. S. Rept. No. 973, 69th Cong., 1st Sess., pp. 16–17. This Court's decisions in *Jensen*, *Knickerbocker Ice*, and *Dawson* were specifically said to be the occasion for the legislation. *Id.* at p. 16. There was no citation or even allusion to the *Rohde* or other "local concern" cases. The purpose and coverage of the bill were explained as follows (*ibid.*):

> * * * * *
>
> The purpose of this bill is to provide for compensation, in the stead of liability, for a

> class of employees commonly known as "longshoremen." These men are mainly employed in loading, unloading, refitting, and repairing ships; but it should be remarked that *injuries occurring in loading or unloading are not covered unless they occur on the ship or between the wharf and the ship so as to bring them within the maritime jurisdiction of the United States.*
>
> * * * * *
>
> It thus appears that there is no way of giving to these hard-working men, engaged in a somewhat hazardous employment, the justice involved in the modern principle of compensation without enacting a uniform compensation statute.
>
> * * * * *
>
> Section (3) of the bill describes the persons to be brought within its terms with such exceptions as are necessary to limit the operation of the bill to the very persons who are intended to be covered by it. [Emphasis added.]

From the statement that injuries are not covered "unless they occur on the ship or between the wharf and the ship so as to bring them within the maritime jurisdiction of the United States," it seems to us to follow that if injuries do occur within admiralty jurisdiction they are covered. Taking this Senate report together with the changes made in the bill and the comments at the hearings, we believe that Section 3, the coverage provision, was designed to include under the Act all injuries (to employees of employers subject to the Act) occurring upon navigable waters and

"within the maritime jurisdiction of the United States," and to exclude from coverage only injuries in maritime employment occurring outside that jurisdiction, such as those on extensions of land. The bill as reported was the subject of little discussion and no controversy on the floor of the Senate, which gave its quick approval. 67 Cong. Rec. 10608, 10614.

b. The House Hearings and Passage.—The Judiciary Committee of the House had previously held hearings and reported favorably on a bill providing for more liberal compensation benefits than the bill which the Senate adopted. H. Rept. No. 1190, 69th Cong., 1st Sess. (accompanying H.R. 12063). The Chairman of the Judiciary Committee, Representative Graham, had been unable to obtain clearance for the House bill from the House Rules Committee, however, and therefore decided to hold new hearings on the Senate bill. Hearings before the House Judiciary Committee on S. 3170, 69th Cong., 1st Sess., Serial 16, Part 2 [hereinafter House Hearings].

The hearings before the House Committee were similar in many ways to those before the Senate. The representatives of the unions stated that they were willing to accept the less generous features of the Senate bill in order to obtain enactment of a bill. House Hearings, pp. 139–140. The representative of the shipyards took exception to the exclusion of seamen, but agreed to accept the bill if the seamen were included within its coverage. *Id.* at pp. 141, 144–146. A witness testifying on behalf of the insurance underwriters requested reinsertion of the exemption for "employment of local concern" into Section 3, which

the Senate Committee had removed (see *supra*, pp. 31–35). *Id.* at p. 180.

The House Committee, in redrafting the Senate bill, rewrote Section 3 as follows (H. Rept. No. 1767, 69th Cong., 2d Sess., p. 2):

> SEC. 3. This act shall apply to any maritime employment performed—
>
> (a) Upon the navigable waters of the United States, including any dry dock; or
>
> (b) As master or member of a crew of a barge, lighter, tug, dredge, vessel, or other ocean, lake, river, canal, harbor, or floating craft owned by a citizen of the United States.
>
> * * * * *

Only seamen of foreign vessels, personnel of the Army, Navy, and Coast Guard, and employees of states were excluded from coverage. *Ibid.* Because of the deletion of the provision in the Senate bill limiting coverage to injuries where workmen's compensation "may not validly be provided by state law," the bill as reported would apparently have covered injuries occurring during maritime employment on extensions of land on navigible waters which have traditionally been beyond maritime jurisdiction and within the jurisdiction of the States.

The explanation of the bill by the House committee was, like its Senate counterpart, brief and general. H. Rept. No. 1767, 69th Cong., 2d Sess., pp. 19–20. The purposes of the bill were summarized in the following manner (*id.* at p. 20):

> *The bill as amended, therefore, will enable Congress to discharge its obligation to the maritime workers placed under their jurisdiction by the*

> *Constitution of the United States* by providing for them a law whereby they may receive the benefits of workmen's compensation and thus afford them the same remedies that have been provided by legislation for those killed or injured in the court of their employment in nearly every State in the Union. [Emphasis added.]

The effect of the coverage provision was described as (*id.* at p. 19):

> The Senate bill as reported by the committee will provide the benefits of workmen's compensation to *practically all maritime workers within the admiralty jurisdiction.* [Emphasis added.]

The report noted that seamen had been included within the coverage of the bill (*id.* at p. 20).

Representative Graham again found it difficult to clear the bill through the House Rules Committee. In order to obtain a rule from that Committee, Representative Graham, with the consent of the members of his Committee, agreed to amend the bill so as to exclude seamen from coverage. 68 Cong. Rec. 5410, 5412. In so doing, the Judiciary Committee adopted the basic structure of the coverage provisions (Section 3) of the bill as it had passed the Senate, including the limitation to injuries where workmen's compensation "may not validly be provided by state law." *Id.* at 5403–5404. In explaining the amendment on the floor of the House, Representative Graham referred to its effect as merely excluding seamen from coverage (*id.* at 5410–5411), as did another pro-

ponent of the bill who had studied it as a member of the Rules Committee (*id.* at 5412).

There was no suggestion by anyone in the debates that any category of workers within admiralty jurisdiction would be excluded from coverage, except seamen and masters. 68 Cong. Rec. 5410–5414. Indeed, when the bill was read to the House, the only part of Section 3 which was quoted was the opening statement that "Compensation shall be payable under this act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock)." *Id.* at 5414. Proponents of the bill supported it on the grounds that "social justice is the keynote of this legislation" and that forty-three States had adopted workmen's compensation acts. *Id.* at 5412, 5413. The opponents of the bill pointed to the presumptions created by Section 20 of the bill, including the presumption of coverage, and objected to its "far-reaching" impact. *Id.* at 5411. None the less, the bill passed the House by a vote of 265 to 7.

c. Senate Passage of the House Bill.—The bill as amended by the House was then laid before the Senate. 68 Cong. Rec. 5900–5908. The floor manager explained that the principal dispute under the bill was over the exclusion of seamen, and noted that seamen, under the bill as amended, were excluded as they wished to be. *Id.* at 5908. Upon this assurance that seamen were excluded, the bill was accepted without opposition. *Id.* at 5908–5909.

d. Summary of the Legislative History.—The legislative history we have just detailed reveals that the original draft of the bill which became the Longshoremen's Act (see *supra*, p. 32) would have provided for the same result as that reached by the court of appeals in this case—that is, it would have specifically excluded from coverage injuries within admiralty jurisdiction which under the *Rohde* decision and the "local concern" doctrine were compensable under state workmen's compensation acts by supplementation of maritime law. However, that provision was rewritten by the Senate Judiciary Committee—in apparent response to objections by employers and insurers that the coverage provision was too vague, was not inclusive enough, and would result in various anomalies, such as that the same craftsmen would receive different compensation for the same injuries on navigable water, depending upon whether the vessel was under construction or repair. The rewritten provision contained the clause, which was finally adopted, limiting coverage to injuries where workmen's compensation "may not validly be provided by State law." This clause was apparently designed, as the change in the statutory language seems to suggest, to exclude only injuries occurring upon extensions of land which were not then regarded as "within the maritime jurisdiction of the United States." S. Rept. No. 973, 69th Cong., 1st Sess., p. 16.

The House committee modified the provision somewhat, intending to include virtually all injuries to amphibious workers within maritime jurisdiction, including those to seamen. H. Rept. No. 1767, 69th

Cong., 2d Sess., p. 19. Because of objections from seamen and members of the House Rules Committee, however, seamen were excluded, and the coverage provision was amended to its present form. But the debates indicate that the amendment was intended to exclude any category of injuries except those to seamen. 68 Cong. Rec. 5410–5414, 5908–5909.

In short, the legislative history reveals the intent of Congress to provide coverage under the Longshoremen's Act for all injuries to employees within the maritime jurisdiction of the United States (including those within the "local concern" doctrine) and to exclude from coverage only those injuries in maritime employment on land or extensions of land where state workmen's compensation applies "by State law" in and of itself.

Although it may appear a little strange today that Congress sought to exclude from the Act's coverage injuries in maritime employment occurring upon extensions of land, the exclusion is easily understandable in light of the problems confronting the draftsmen at the time. The exclusion of such injuries from the maritime jurisdiction of the United States had been settled by authoritative decisions of this Court. *Industrial Commission* v. *Nordenholt Corp.*, 259 U.S. 263 (see *supra*, pp. 28–29); *Cleveland Terminal Valley R.R. Co.* v. *Cleveland S.S. Co.*, 208 U.S. 316. As the House report explained, the Longshoremen's Act was designed to enable "Congress to discharge its obligation to the maritime workers placed under their jurisdiction by the Constitution." H. Rept. No. 1767, 69th Cong., 2d Sess., p. 20. The

Senate report also explained that the Act was limited to injuries "within the maritime jurisdiction of the United States." S. Rept. No. 973, 69th Cong., 1st Sess., p. 16. Thus, in determining the coverage of the Act, Congress accepted the then recognized line of demarcation between federal maritime and state authority.[11] The invalidation by this Court of two prior statutes enacted by Congress to permit state workmen's compensation for workers injured within the maritime jurisdiction made the draftsmen careful to avoid any possible constitutional pitfalls.[12]

The Court of Appeals for the Fifth Circuit based its decision below on the ground that Congress had intended to exclude from coverage injuries within admiralty jurisdiction which, prior to 1927, were compensable under state workmen's compensation laws by their supplementation of admiralty law under the "local concern" doctrine (as exemplified in the *Rohde* case), as well as injuries on extensions of land which were within the State's own jurisdiction and therefore were compensable under state workmen's compensation laws by their own force. While Section

[11] Section 3(a) did provide that injuries occurring on dry docks and marine railways were within the coverage of the Act. See *Avondale Marine Ways* v. *Henderson*, 346 U.S. 366, affirming 201 F. 2d 437 (C.A. 5) (see *infra*, pp. 55-56). Dry docks, however, float on water, and marine railways are apparently regarded merely as extensions of dry docks.

[12] Subsequently, it has become clear that Congress has the power to extend maritime jurisdiction. *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U.S. 36; see also *United States* v. *Matson Navigation Co.*, 201 F. 2d 610 (C.A. 9). At that time, however, the possible constitutional objections to the Longshoremen's Act were not considered frivolous. See *Crowell* v. *Benson*, 285 U.S. 22.

3(a) on its face is susceptible to such a construction, we think the legislative history reveals that Congress intended to accept the then recognized line of demarcation between state and federal maritime jurisdiction, and exclude only those injuries to which "State law" in itself would apply because they were beyond maritime jurisdiction. Indeed, prior to the decisions in these cases, the Fifth Circuit itself had, on the basis of the background and legislative history of the Longshoremen's Act, reached the same conclusion that we have set forth—namely that Congress had intended the Act to cover injuries on navigable waters which, although within the "local concern" doctrine, were also within admiralty jurisdiction, and to exclude only those injuries which were within the exclusive jurisdiction of the States. *Continental Casualty Co.* v. *Lawson*, 64 F. 2d 802, 805, *De Bardeleben Coal Co.* v. *Henderson*, 142 F. 2d 481, 483.[13] Accord, *Travelers Ins. Co.* v. *McManigal*, 139 F. 2d 949, 951 (C.A. 4); *Western Boat Building Co.* v. *O'Leary*, 198 F. 2d 409, 414 (C.A. 9). See our discussion of these cases *infra*, pp. 65–69.

3. Under the Controlling Decisions of this Court, the Longshoremen's Act Applies to All Injuries Occurring at Places within Admiralty Jurisdiction Whether the Injury Would Also Be Compensable under a State Workmen's Compensation Act by Virtue of the "Local Concern" Doctrine.

Since the passage of the Longshoremen's Act in 1927, this Court has on numerous occasions discussed or decided the scope of coverage of the federal and

[13] The court of appeals below expressly recognized the conflict between the construction of the Act adopted in the cases at bar, and that followed by it previously (R. 51–52).

state workmen's compensation acts. These cases, we submit, are controlling here, and require that the awards under the Act be sustained. Considered together, they stand for the proposition that all injuries within the recognized tort jurisdiction of admiralty are compensable under the federal legislation.

a. The Decisions of This Court.—In *Parker* v. *Motor Boat Sales Co.*, 314 U.S. 244, an employee, who had been "hired primarily as a janitor and porter" (*id.* at 247) and whose duties were mostly on shore, was drowned when the boat in which he was riding capsized on the James River near Richmond, Virginia. He had been riding in the boat to keep a lookout for hidden objects in the water, in furtherance of his employer's business. The Deputy Commissioner made an award to his widow of compensation under the Longshoremen's Act. The court of appeals, however, held the award invalid on the grounds, *inter alia*, that coverage under Section 3(a) (33 U.S.C. 903(a)) was excluded because the deceased's employment was "local" in nature and therefore compensation under the state workmen's compensation act could validly have been provided under the "local concern" doctrine. The court of appeals relied upon *Alaska Packers Ass'n* v. *Industrial Accident Commission*, 276 U.S. 467, which involved a fisherman, who also had duties in connection with canning fish ashore and was injured while attempting to push his boat into the water in preparation for storing it after the fishing season had ended. The Court held that the fisherman was engaged in activities which were not directly related to navigation and were "local in character" so that the

state workmen's compensation act could validly apply under the "local concern" doctrine. *Id.* at 469.

This Court reversed the court of appeals in the *Parker* case unanimously. The Court found that the locus of the accident on navigable water and the maritime activity in which the employee was engaged at that time brought the employee within the area of Congressional power to legislate. The Court stated that, if the decision of the court of appeals was to be sustained, it must be on the ground that the employment was "subject to state regulation until Congress has exercised its paramount power" and that by Section 3(a) of the Act "Congress kept out of the area in which recovery * * * may * * * validly be provided by State law * * *." 314 U.S. at 247–248. The Court refused, however, to accept a literal reading of Section 3(a), since such a reading would call for reevaluation of the *Jensen, Knickerbocker Ice,* and *Dawson* cases (see *supra,* pp. 25–26, 29), which held that federal jurisdiction was exclusive within the jurisdiction of admiralty law even in the absence of action by Congress. For, if those cases were wrong, a State could validly provide compensation for any injury upon navigable water within its boundaries and a literal reading of Section 3(a) would mean that the Longshoremen's Act would almost never be applicable. Instead, the Court stated that there was no need to reexamine the *Jensen* line of cases because (314 U.S. at 249–250):

> There can be no doubt that the purpose of the Act was to provide for federal compensation in the area which the specific decisions referred

> to placed beyond the reach of the states. The proviso permitting recovery only where compensation "may not validly be provided by State law" cannot be read in a manner that would defeat this purpose. An interpretation which would enlarge or contract the effect of the proviso in accordance with whether this Court rejected or reaffirmed the constitutional basis of the *Jensen* and its companion cases cannot be acceptable. The result of such an interpretation would be to subject the scope of protection that Congress wished to provide, to uncertainties that Congress wished to avoid.
>
> The main impetus for the Longshoremen's and Harbor Workers' Compensation Act was the need to correct a gap made plain by decisions of this Court. We believe that there is only one interpretation of the proviso in § 3(a) which would accord with the aim of Congress: the field in which a state may not validly provide for compensation must be taken, for the purposes of the Act, as the same field which the *Jensen* line of decision excluded from state compensation laws. Without affirming or rejecting the *constitutional* implications of those cases, we accept them as the measure by which Congress intended to mark the scope of the Act they brought into existence. [Emphasis in original.]

The Court had no occasion to, and did not, consider the precise scope of Section 3(a), for it found that the injury was within the area of federal jurisdiction under *Jensen*. Thus, the opinion did not discuss the question whether Section 3(a) was intended to exclude injuries within the admiralty jurisdiction but also

within the "local concern" doctrine.[14] However, the Court allowed a claim under the Longshoremen's Act in a situation which would appear to be covered by the "local concern" doctrine since the facts—a janitor aboard a motorboat, keeping a lookout for hidden objects—were extremely close to those in *Alaska Packers Ass'n* v. *Industrial Accident Commission*—a fisherman attempting to push his boat into the water (see *supra*, p. 46)—and other "local concern" cases upholding the application of state workmen's compensation laws. We believe, therefore, that the Court in effect held in *Parker* that Section 3(a) incorporates the line drawn in the *Jensen* case between admiralty and state jurisdiction but without an exception for matters of "local concern." This is the interpretation which has been made by the lower courts and the commentators, who have generally construed *Parker* as heralding a narrow construction of the proviso of Section 3(a) and a correspondingly broad construction of the coverage of the Act. *E.g., Travelers Ins. Co.* v. *McManigal*, 139 F. 2d 949, 951 (C.A. 4); *Western Boat Building Co.* v. *O'Leary*, 198 F. 2d 409, 414 (C.A. 9); *De Bardeleben Coal Corp.* v. *Henderson*, 142 F. 2d 481, 484 (C.A. 5); Gilmore & Black, *Admiralty*, § 6–49, p. 347.

Shortly after the decision in *Parker*, this Court, in *Davis* v. *Department of Labor*, 317 U.S. 249, which has properly been regarded as a landmark case, stated the general principles which govern the relationship between state and federal compensation acts

[14] Counsel for the Deputy Commissioner in *Parker* did not urge that the Act covered such injuries. Brief for Petitioner in No. 46, Oct. Term 1941.

in the area of maritime injuries to amphibious workers. In that case the Court upheld an award under a state workmen's compensation act to an employee who was injured while standing on a barge on a navigable river, dismantling a drawbridge which was an obstruction to navigation. The Court recognized that the amphibious worker faced a jurisdictional dilemma in trying to determine whether to seek state or federal compensation for his injuries since the application of the "local concern" doctrine depended upon the "surrounding circumstances" of each case. *Id.* at 253. As a result, a "twilight zone" had been created where the proper remedy was "extremely difficult" to determine. *Id.* at 253, 256. The Court said that, if the worker were forced to choose between the state act and the Longshoremen's Act, he would have to determine with certainty a "question over which courts regularly divide among themselves and within their own membership," at the risk not only of the serious financial loss and delay of litigation, but also of being barred by the statute of limitations in the proper forum while he was erroneously pursuing his claim elsewhere. *Id.* at 254. And this dilemma would conflict with the very purpose of workmen's compensation (*id.* at 254):

> Such a result defeats the purpose of the federal act, which seeks to give "to these hardworking men, engaged in a somewhat hazardous employment, the justice involved in the modern principle of compensation" * * *.

In order to resolve the dilemma posed for the employee by injuries occurring within the "twilight zone," the Court relied on two presumptions: the pre-

sumption of the constitutionality of the state workmen's compensation law, on the one hand, and the statutory presumption of coverage (Section 20(a), 33 U.S.C. 920(a), *supra*, p. 4) under the Longshoremen's Act, on the other. Where the injured employee sought recovery under the state act, the presumption of constitutionality would sustain an award. 317 U.S. at 257. Similarly, the statutory presumption in the Longshoremen's Act could sustain an award in the very same circumstances (317 U.S. at 256–257):

> Where there has been a hearing by the federal administrative agency entrusted with broad powers of investigation, fact finding, determination, and award, our task proves easy. There, we are aided by the provision of the federal act, 33 U.S.C. § 920, which provides that, in proceedings under that act, jurisdiction is to be "presumed, in the absence of substantial evidence to the contrary." Fact findings of the agency, where supported by the evidence, are made final. Their conclusion that a case falls within the federal jurisdiction is therefore entitled to great weight and will be rejected only in cases of apparent error. It was under these circumstances that we sustained the Commissioner's findings in *Parker* v. *Motor Boat Sales, supra.*

The two presumptions in effect gave the employee injured in the twilight zone an election to proceed under either federal or state law. Mr. Justice Frankfurter, in a concurring opinion in *Davis*, stated that "the practical result" of the Court's holdings was that "the employee in a situation like the present is permitted to recover either under the federal act

[citing, *inter alia*, *Parker* v. *Motor Boat Sales Co.*] * * * or under a state statute [citing, *inter alia*, *Alaska Packers Ass'n* v. *Industrial Accident Commission*] * * *." 317 U.S. at 259. Chief Justice Stone, dissenting, similarly recognized that the Court had enunciated the doctrine "that recovery under either the state or the federal act is to be sustained if the case is thought a close one"; he criticized the "proposition that an employee in a 'twilight zone' (where it is doubtful whether the federal or a state act applies) can recover under either act * * *." *Id.* at 261, 262. And the Court has recently said concerning the *Davis* decision (*Hahn* v. *Ross Island Sand & Gravel Co.*, 358 U.S. 272, 273):

> As to cases within this "twilight zone," *Davis* in effect gave an injured waterfront employee an election to recover compensation under either the Longshoremen's Act or the Workmen's Compensation Law of the State within which the injury occurred.

Although *Davis* resolved the employee's jurisdictional dilemma, and provided clear guidelines for decisions concerning injuries within the "twilight zone," the Court's opinion in that case did not define the limits of that zone of possibly overlapping remedies. Within the next few years, however, the scope of that zone was indicated by later decisions of the Court.

As we have noted (*supra*, pp. 30–31), prior to the adoption of the Longshoremen's Act in 1927, the Court had made clear that where injuries on navigable waters arose out of repair work on a completed vessel, state workmen's compensation acts could not validly apply under the "local concern" doctrine. *Great Lakes Dredge & Dock Co.* v. *Kierejewski*, 261 U.S. 479;

Gonsalves v. *Morse Dry Dock & Repair Co.*, 266 U.S. 171; *Robins Dry Dock & Repair Co.* v. *Dahl*, 266 U.S. 449; accord, *Messel* v. *Foundation Co.*, 274 U.S. 427; *Baizley Iron Works* v. *Spun*, 281 U.S. 222. After this Court's decision in *Davis*, employers argued that injuries occurring on navigable waters arising out of the repair of completed vessels were not within the "twilight zone" where state as well as federal workmen's compensation acts applied, because the pre-1927 precedents clearly showed that they were within the exclusive domain of federal law. And a California court adopted their argument. *Baskin* v. *Industrial Accident Commission*, 89 Cal. App. 2d 632, 201 P. 2d 549.

The Supreme Judicial Court of Massachusetts, however, took a different view in *Moore's* case, 323 Mass. 162, 80 N.E. 2d 478. The employee in that case was injured while engaged in the repair of a completed vessel which was in a dry dock floating on the navigable waters of Boston harbor. He sought compensation under the state workmen's compensation act. Under the pre-1927 decisions of this Court and of the Massachusetts court,[15] federal maritime jurisdiction was exclusive because the work had a direct relation to navigation and the injury occurred upon navigable waters, so that the "local concern" doctrine would not have supported an award under the state workmen's compensation act. Accordingly, if the pre-1927 precedents were controlling, and the "twilight zone" did not extend to injuries clearly within such precedents, then the claim under the state compensation

[15] *O'Hara's Case*, 248 Mass. 31, 142 N.E. 844 (1924); *Ahern's Case*, 247 Mass. 512, 142 N.E. 703 (1923).

act would have to be dismissed. 323 Mass. at 166. The Supreme Judicial Court held, however, that the reason for the *Davis* decision would be defeated if the "twilight zone" were so limited (*id.* at 167):

> * * * [T]he most important question has now become the fixing of the boundaries of the new "twilight zone," and for this the case gives us no rule or test other than the indefinable and subjective test of doubt. Mr. Justice Frankfurter says that "Theoretic illogic is inevitable so long as the employee * * * is permitted to recover" at his choice under either act. 317 U.S. at page 259. Probably therefore our proper course is not to attempt to reason the matter through and to reconcile previous authorities, or to preserve fine lines of distinction, but rather simply to recognize the futility of attempting to reason logically about "illogic," and to treat the *Davis* case as intended to be a revolutionary decision deemed necessary to escape an intolerable situation and as designed to include within a wide circle of doubt all water front cases involving aspects pertaining both to the land and to the sea where a reasonable argument can be made either way, even though a careful examination of numerous previous decisions might disclose an apparent weight of authority one way or the other. We can see no other manner in which the *Davis* case can be given the effect that we must suppose the court intended it should have, and we must assume that the court intends to follow that case in the future.

Therefore, the court held that the "twilight zone" included cases which, prior to 1927, might have been found to be within exclusive federal maritime juris-

diction, and determined that in such cases the employee's election of state workmen's compensation should be sustained under the presumption of constitutionality.

This Court affirmed the Massachusetts decision without opinion on the basis of its decision in *Davis. Bethlehem Steel Co.* v. *Moores,* 335 U.S. 874. The judgment in the California case was vacated and the case remanded for consideration in the light of the *Moores* and *Davis* cases. *Baskin* v. *Industrial Accident Commission,* 338 U.S. 854. On remand from this Court's decision, the California court ordered the State Industrial Accident Commission to take jurisdiction under the state compensation law (97 Cal. App. 2d 257, 217 P. 2d 733) and this Court affirmed that order in a *per curiam* opinion which merely cited the *Moores, Davis,* and earlier *Baskin* cases. *Kaiser Co.* v. *Baskin,* 340 U.S. 886. These cases clearly hold that the "twilight zone" has a very broad scope, and that state workmen's compensation laws can be applicable to an injury even though it occurred, under both the pre- and post-1927 precedents, within the area of exclusive federal jurisdiction.

A more recent decision of this Court applied the principles announced in *Davis* to an action brought under the Longshoremen's Act. *Avondale Marine Ways* v. *Henderson,* 346 U.S. 366. In that case an employee was killed while engaged in the repair of a barge which was on a marine railway [16] on land, approximately 400 feet from navigable waters. The

[16] A marine railway consists of rails which extend from the land into the water, and a carriage on rollers which carries

employer[17] contended that this Court held in *Industrial Commission* v. *Nordenholt Corp.*, 259 U.S. 263 (see *supra*, pp. 28–29), that state compensation acts applied to injuries occurring on land. Therefore, it claimed, even if a marine railway was considered as a drydock, which Section 3(a) specifically includes within its definition of navigable waters, the Longshoremen's Act could not apply since the Act covers only injuries not provided for "by State law." Brief for Petitioner in No. 44, Oct. Term, 1953, pp. 7–25. After full briefing and oral argument, this Court rejected the employer's contention and affirmed the award of Longshoremen's Act compensation in a *per curiam* opinion citing *Davis*, *Baskin* v. *Industrial Accident Commission*, and *Moores*, *supra*.

The *Avondale Marine Ways* case is almost the converse of *Baskin* and *Moores*. In those cases, the Court held that an injury within the area of exclusive federal jurisdiction under the earlier cases (and therefore clearly within the coverage of the Longshoremen's Act) was also compensable under state workmen's compensation laws. In *Avondale Marine Ways*, the Court held that an injury within traditional state jurisdiction (*Industrial Commission* v. *Nordenholt Corp.*, *supra*), and therefore covered by state workmen's compensation laws under state law in and

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the vessel from the water to the land, so that its hull can be repaired. In the usage of the ship building and repair industry, a marine railway is a dry dock, as are graven and floating dry docks which are used to repair vessels. *Maryland Casualty Co.* v. *Lawson*, 101 F. 2d 732, 733 (C.A. 5).

[17] Avondale Marine Ways, Inc. was the predecessor corporation to Avondale Shipyards, Inc., one of the employers in the present case.

of itself (not under the "local concern" doctrine), was still within the "twlight zone" and thus was covered by the Longshoremen's Act.

One other recent decision of this Court has considered the proper scope of Section 3(a) of the Longshoremen's Act. In *Pennsylvania R.R. Co.* v. *O'Rourke*, 344 U.S. 334, a freight brakeman was injured while releasing a brake on a railroad freight car that was located on a car float on navigable waters. The question was whether the Longshoremen's Act or the Federal Employers' Liability Act applied. In holding that the injuries were compensable exclusively under the Longshoremen's Act, this Court first stated that "New Jersey could not have enacted statutes granting compensation for respondent's injury on navigable water. Therefore respondent comes within the coverage of that portion of § 903(a) [Section 3(a) of the Act] that includes those outside the reach of state compensation laws." *Id.* at 337. The Court then ruled that the fact that the employee's duties were commonly regarded as "railroading" rather than those of longshoremen "misses the mark. The statute applies, by its own terms, to accidents on navigable waters when the employer has any employees engaged in maritime service." *Id.* at 339. The Court stated that the exclusive coverage of the Longshoremen's Act (*id.* at 340):

> extends to an employee of an employer, made liable by § 904, when he is injured, in the course of his employment, on navigable water. The Court of Appeals, we think, is in error in holding that the statute requires, as to the employee, both injury on navigable water and maritime

employment as a ground for coverage by the Compensation Act.

The Court thus held that, regardless of the nature of the individual employee's activity at the time of the accident, the Longshoremen's Act applied if the injury occurred upon navigable waters. The Court's statement that "respondent comes within that portion of §903(a) [Section 3(a)] that includes those outside the reach of state compensation laws" does not indicate that, if the injury is within the reach of such laws, the Longshoremen's Act cannot apply. On the contrary, that statement indicates that a portion of the Act's coverage under Section 3(a) also includes injuries which are within the reach of state workmen's compensation.[18] The appellate decisions relied on by the Court (344 U.S. at 339), such as *De Bardeleben Coal Corp.* v. *Henderson*, 142 F. 2d 481, and *Travelers Ins. Co.* v. *McManigal*, 139 F. 2d 949 (C.A. 4) (see *supra*, p. 49), further demonstrate that the Court was not holding that the federal Act was inapplicable to all injuries within the coverage of state workmen's compensation laws. For these appellate decisions upheld awards under the Act for injuries which,

[18] The court of appeals below has attempted to distinguish *O'Rourke* on the ground that the decision was based on the fact that the employee there was at the moment of his injury engaged in the traditional maritime employment of unloading cargo from a vessel. R. 53; *Flowers* v. *Travelers Ins. Co.*, 258 F. 2d 220, 223. While the facts in *O'Rourke* are perhaps susceptible to such a construction, we think that this Court's opinion makes it clear that the decision rested upon the locus of the injury being on navigable waters within admiralty jurisdiction and not upon the kind of work being done (see *supra*, p. 57). Similarly, the dissenting opinion was based upon the premise that O'Rourke was engaged in railroading, not in any maritime activity. 344 U.S. at 342–343.

prior to 1927, would have been compensable through state workmen's compensation under the "local concern" doctrine.[18a]

b. The Meaning and Effect of This Court's Decisions.—The principles announced and applied by the Court in *Davis, Avondale Marine Ways,* and *O'Rourke, supra,* appear to be controlling in favor of petitioners. These cases hold that an injury occurring on navigable waters (including a dry dock or marine railway) which is within admiralty jurisdiction is within the coverage of the Longshoremen's Act upon the election of the employee, whether or not the pre-Act precedents would permit recovery under state workmen's compensation legislation and regardless of the nature of the employee's activity at the moment of his injury. These principles are in accord with the legislative aim because, as we have shown above (pp. 31–45), Congress intended to exclude from the Act only those injuries in maritime employment which were beyond admiralty tort jurisdiction, but not those to which state law applied under the "local concern" doctrine. And as we will show (pp. 62–69), the principles so announced have provided clear guidance for the lower courts and have succeeded in avoiding

[18a] The court below relied upon *Kossick* v. *United Fruit Co.*, 365 U.S. 731, and *Hahn* v. *Rock Island Sand & Gravel Co.*, 358 U.S. 283, for the proposition that the "local concern" doctrine has retained its vitality (R. 51–52). There is no doubt, however, that the doctrine applies so as to allow state compensation to cover "local" injuries within maritime jurisdiction. The issue here, however, is the entirely different one whether injuries covered by state acts under the "local concern" doctrine are excluded from the coverage of the Longshoremen's Act.

costly and time-consuming litigation over the line between the state and federal compensation acts.

The decision in *Avondale Marine Ways*, upholding an award under the federal Act, shows that coverage under the Act is not foreclosed merely because the employee could now also be covered under a state compensation act, or because he could have been covered under a state act under the pre-1927 precedents. The present cases, in which the injuries occurred upon navigable waters, are obviously stronger cases for the applicability of the federal statute than the *Avondale Marine Ways* case. In the latter case, although the employee was injured while repairing a barge, the injury occurred while the employee and the barge were on land, on a marine railway approximately 400 feet from navigable waters. In *Avondale Marine Ways* as in the present cases, state law might validly provide compensation for the injuries under both the pre-1927 precedents and the more recent cases.

The court below attempted to distinguish *Avondale Marine Ways* on the ground that in the present cases there was "the categorical pre-1927 holding" in *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U.S. 469[19] (see *supra*, pp. 27–28), that a State may validly provide compensation for injuries sustained while working on an uncompleted ship upon navigable waters (R. 53). There was, however, a far more categorical

[19] We show below (pp. 74–76) that the *Rhode* decision was distinguishable from the situation presented here, and that therefore *Rohde* would have provided little guidance, even in 1927, as to whether the "local concern" doctrine would have upheld recovery under a state workmen's compensation act.

pre-1927 holding that a State may provide compensation for injuries sustained while performing maritime work upon land (*Industrial Commission* v. *Nordenholt Corp.*, 259 U.S. 263 (see *supra*, pp. 28–29, 56))—the precise situation which this Court held in *Avondale Marine Ways* was covered by the federal Act. Indeed, prior to 1927, an injury occurring in the performance of a maritime activity on land was within the *exclusive* jurisdiction of the State (*Industrial Commission* v. *Nordenholt*, *supra*), so that recovery for such injuries under state workmen's compensation laws was validly "provided by State law" (Section 3(a)) in and of itself rather than by supplementation of federal admiralty law through the "local concern" doctrine. On the other hand, state compensation for injuries upon uncompleted vessels on navigable waters, under *Jensen* and *Rohde*, could, at most, only be provided through the "local concern" doctrine of the federal maritime law.

The principles announced and applied in *Davis*, *Avondale Marine Ways*, and *O'Rourke*, have worked extremely well in practice. Perhaps the most forceful illustration of this has been the relatively few cases in which the issue of state versus federal coverage has been litigated[20] since their announcement, compared to the volume of litigation prior to that

[20] Since this Court's decision in *Avondale Marine Ways*, *supra*, in 1953, we have found only three federal appellate decisions outside the Fifth Circuit. *Morrison-Knudsen Co.* v. *O'Leary*, 288 F. 2d 542 (C.A. 9), certiorari denied, 368 U.S. 817; *Dixie Sand & Gravel Co.* v. *Holland*, 255 F. 2d 304 (C.A. 6); *Newport News Shipbuilding & Dry Dock Co.* v. *O'Hearne*, 192 F. 2d 968 (C.A. 4). The Fifth Circuit cases are *Flowers* v. *Travelers Ins. Co.*, 258 F. 2d 220, certiorari denied, 359

time.[21] One of the central purposes of both the state and federal workmen's compensation acts was to provide compensation "* * * without the delay and expense which an action at law entails." H. Rept. No. 1767, 69th Cong., 2d Sess., p. 20. This overriding legislative purpose, which was at the very heart of the *Davis* decision (317 U.S. at 254), has been largely achieved under the principles announced by this Court.

In contrast, under the construction of the Longshoremen's Act followed by the court of appeals here, the injured employee would be forced to thread his way through the maze of "local concern" decisions, preceding and contemporaneous with the Longshoremen's Act, to determine whether he should seek compensation under the state workmen's compensation act or the Longshoremen's Act. For under the court of appeals' decision, if the pre-1927 line was "clearly drawn" (R. 48–49) so as to make the injury compensable by state law under the "local concern" doctrine, the federal Act could not be applicable.[22] Apart

U.S. 920; *Noah* v. *Liberty Mutual Ins. Co.*, 267 F. 2d 218, setting aside 265 F. 2d 547; *T. Smith & Son, Inc.*, v. *Williams*, 275 F. 2d 397; and *Thibodeaux* v. *McDermott & Co.*, 276 F. 2d 42. Although we have not made an exhaustive survey of the state reports since 1953, the only state court cases since that date of which we are aware are *Ellis* v. *Travelers Ins. Co.*, 241 La. 433, 129 So. 2d 729, and *Stepter* v. *T. Smith & Son, Inc.*, 241 La. 465, 129 So. 2d 740. The Fifth Circuit and Louisiana cases must be attributed at least in part to the erroneous construction of the Longshoremen's Act first indicated in *Flowers* v. *Travelers Ins. Co.*, *supra*.

[21] Some hint of the number of cases on this subject during the thirties and forties may be seen from this Court's partial collection of authorities in *Davis* v. *Department of Labor*, 317 U.S. 249, 253.

[22] The decision of the court of appeals itself is not entirely clear on this point, but it apparently would give some scope

from the intent of Congress to provide an opportunity for federal relief for any injury within admiralty jurisdiction (see *supra*, pp. 31–45), the difficulty with the construction adopted by the court of appeals is that, as the pre-1927 cases show, a situation which is "clear" to one court is often very unclear to another (see *infra*, pp. 74–80). The recent experience in the Court of Appeals for the Fifth Circuit has demonstrated that that court's construction of the Longshoremen's Act will almost certainly lead, as it has in the Fifth Circuit,[23] to an increasing amount of litigation and a consequent increase in the delay and expense which the Longshoremen's Act and the state workmen's compensation acts were designed to avoid.

The adoption of the "clear" pre-1927 precedents as the basis for decision would create a series of arbitrary distinctions and anomalous results. Indeed, the opinion below concedes that it "may produce results that are extremely fine" (R. 54). For example, shipyard employees, such as the welders involved in these cases,[24] would not be covered by the Longshoremen's Act if they were working upon the launched hull of a new vessel still under construction, but would be covered if they momentarily happened to move over to do the same kind of work on the hull of completed

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to *Davis* and not deny recovery unless the pre-Longshoremen's Act precedents were deemed to be "clear" (R. 47–49).

[23] For the recent cases in that court, see *supra*, p. 61, note 20.

[24] Roger McGuyer, like other welders in his shipyard, would work on repair projects one day and on new vessels the next (R. 30). Although Minus Aizen had worked only on new construction in his short period of employment, construction workers at his yard would occasionally engage in repair work, and there is nothing in the record to indicate that his contract of employment was different in this respect from those of his coworkers (R. 87–88).

vessel undergoing repairs (R. 55). Yet, as we have shown above (pp. 32–36), those who drafted the coverage provision of the Act were apparently attempting to avoid this very anomaly. Similarly, under the interpretation adopted by the court of appeals below, injuries received on a marine railway on land are within federal coverage (*Avondale Marine Ways*), while injuries occurring upon an uncompleted vessel afloat upon navigable waters are within the exclusive coverage of state workmen's compensation laws (R. 53). Thus, the incongruous result would be that injuries on land which, prior to the Longshoremen's Act were held to be within the exclusive jurisdiction of state law (*Industrial Commission* v. *Nordenholt*, 259 U.S. 263 (see *supra*, pp. 28–29)), would be within the coverage of the federal Act. On the other hand, injuries on navigable waters which are within the traditional jurisdiction of federal maritime law—and where state acts are applied only under the "local concern" doctrine (*Grant Smith-Porter Co.* v. *Rohde*, 257 U.S. 469, 476 (see *supra*, pp. 27–28))—would be within the exclusive coverage of state workmen's compensation acts.

There is no justification in the language or the legislative history of the Longshoremen's Act, or in any decision of this Court for such results.[25] On the con-

[25] As noted above, Congress apparently accepted the then recognized line of demarcation between injuries at places within admiralty jurisdiction, and those within the jurisdiction of the States, and intended to exclude injuries on extensions of land. This line is supported by express legislative history and many years of judicial decision (see *supra*, pp. 31–58). The anomalies created by the theory adopted by the court of appeals below are supported by neither.

trary, the Court has recognized that workmen's compensation laws, including the Longshoremen's Act, are to be liberally construed to avoid anomalies. *Voris* v. *Eikel*, 346 U.S. 328; *Baltimore & P.S.B. Co.* v. *Norton*, 284 U.S. 408; see *Pillsbury* v. *United Engineering Co.*, 342 U.S. 197, 200. As this Court has stated in interpreting the Longshoremen's Act (*Voris* v. *Eikel*, *supra*, 346 U.S. at 333):

> This Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.[26]

4. The Decisions of the Courts of Appeals Hold That Injuries Within Federal Jurisdiction Are Within the Coverage of the Act

Except for the recent line of decisions in the Court of Appeals for the Fifth Circuit (see *supra*, p. 61, note 20), the principles announced and applied in *Davis*, *O'Rourke*, and *Avondale Marine Ways* have

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[26] Congress has accepted the principles and interpretation of the Longshoremen's Act announced and adopted by the Court. Not only has Congress revealed its acquiescence in these decisions by not changing the Act to overturn or modify them but it has on several instances amended and liberalized the Act without expressing any criticism or doubt as to this Court's interpretation of the coverage provisions. Act of June 24, 1948, 62 Stat. 602; S. Rept. No. 1315, H. Rept. No. 2095, and H. Conf. Rept. No. 2329, 80th Cong., 2d Sess.; Act of July 26, 1956, 70 Stat. 654; S. Rept. No. 853, 84th Cong., 1st Sess.; H. Rept. No. 2067, 84th Cong., 2d Sess.; Act of August 23, 1958, 72 Stat. 835; H. Rept. No. 2287, 85th Cong., 2d Sess.; Act of September 13, 1960, 74 Stat. 900; H. Rept. No. 2187, 86th Cong., 2d Sess. Since the coverage provisions of the Act were not affected by these amendments, the Committee reports did not discuss them in detail. However, one of the reports recognizes that, under the principles adopted by the Court, the Longshoremen's Act provides coverage for employees injured at places within federal maritime jurisdiction and excludes only injuries on land or extensions of land within the States' jurisdic-

been followed by the circuit courts. Since the *Davis* decision in December 1942, we have found no instance (prior to the decisions here) in which an employee injured upon navigable waters, and not upon an extension of land, has been denied recovery under the Longshoremen's Act by a court of appeals because the nature of his employment or activity at the time of his injury was a matter of "local concern." See Gilmore & Black, *Admiralty*, § 6–48, pp. 352–353; Note, *Overlapping Remedies for Injured Harbor Workers: Interaction on the Waterfront*, 67 Yale L.J. 1205, 1241–1244. On the contrary, the only decisions involving such activities have upheld awards of compensation under the Longshoremen's Act. *Travelers Insurance Co.* v. *McManigal*, 139 F. 2d 949 (C.A. 4); *Newport News Shipbuilding & Dry Dock Co.* v. *O'Hearne*, 192 F. 2d 968 (C.A. 4); *Dixie Sand & Gravel Co.* v. *Holland*, 255 F. 2d 304 (C.A. 6); *Morrison-Knudsen Co.* v. *O'Leary*, 288 F. 2d 542 (C.A. 9), certiorari denied, 368 U.S. 817; *De Bardeleben Coal Corp.* v. *Henderson*, 142 F. 2d 481 (C.A. 5).[27]

In *Travelers Insurance Co.* v. *McManigal, supra*, a carpenter was killed as a result of injuries received

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tion. In discussing the scope of the Act, H. Rept. No. 2287, 85th Cong., 2d Sess., p. 2, says that the Act:

> • • • provides compensation for injuries suffered by longshoremen, ship repairmen, ship servicemen and workers in related employment when they are working for private employers *within the Federal maritime jurisdiction on the navigable waters of the United States including dry docks.* These employees are subject to the protection of State safety standards when performing work on docks and other shore areas. [Emphasis added.]

[27] If *De Bardeleben* is, as it appears to be, a case involving an employment and activity of "local concern" it was overruled by the decision of the court of appeals below.

upon a structure which was in the process of being constructed into a dry dock. The employer contended that the employment, being construction, was not maritime, and that if it were maritime it was a matter of "local concern," so that the exclusive remedy for the injury was provided by state law. 139 F. 2d at 949. The Court of Appeals for the Fourth Circuit rejected that argument and held the Longshoremen's Act applicable. It refused to follow its 1933 ruling in *United States Casualty Co.* v. *Taylor*, 64 F. 2d 521, certiorari denied, 290 U.S. 639, which held that, since the Longshoremen's Act did not apply to injuries within the "local concern" doctrine, the Act was inapplicable to injuries to employees of an employer engaged in the construction of new vessels occurring upon navigable waters."[28]

The Fourth Circuit's rejection both of the *Taylor* decision and of the theory that the pre-1927 "local concern" cases demarcate the coverage of the Longshoremen's Act was made even clearer by *Newport News Shipbuilding & Dry Dock Co.* v. *O'Hearne*, *supra*, 192 F. 2d at 970–971. The court specifically reaffirmed its decision in the *McManigal* case and held that the Act covered an injury to a welder who was engaged in repairing a dry dock. While the case involved the repair rather than construction of a dry dock, the court stated generally that the Longshoremen's Act "should be broadly construed to cover any activity of a maritime nature in a dry dock in the same manner as if it occurred on navigable waters." *Id.* at 971.

[28] The court of appeals below recognized that the Fourth Circuit's *Taylor* decision is "no longer followed" by that court (R. 53, note 20).

In *Dixie Sand & Gravel Co.* v. *Holland, supra,* the Sixth Circuit ruled that an award could be made under the Longshoremen's Act for the death of an employee who slipped into the water and drowned while accompanying a night watchman on his rounds of gravel yards and moored barges, if the death arose in the course of his employment. Relying upon *Pennsylvania R. Co.* v. *O'Rourke,* 344 U.S. 334 (see *supra,* pp. 56–58), the court ruled that, since the employer, which concededly had employees engaged in maritime employment upon navigable waters, was an employer subject to the Longshoremen's Act, the employee's death upon navigable waters was covered by that Act whether or not he was engaged in maritime employment at the moment of his death. 255 F. 2d at 309.

In *Morrison-Knudsen Co.* v. *O'Leary, supra,* the Court of Appeals for the Ninth Circuit upheld awards under the Longshoremen's Act for the deaths of employees engaged in the construction of a dam on the Snake River, at a time when they were on a boat in a diversion tunnel, attempting to plug the tunnel. Although the principle dispute was whether the waters of the tunnel were navigable, the court of appeals also ruled that the employment was maritime in nature. The employer made no contention that only state workmen's compensation was applicable under the "local concern" doctrine apparently because the Ninth Circuit had so clearly ruled that that doctrine did not narrow the coverage of the federal Act. *E.g., Western Boat Bldg. Co.* v. *O'Leary,* 198 F. 2d 409 (C.A. 9).

The cases at bar are even more clearly within the coverage of the Longshoremen's Act than the *McMani-*

gal, Newport News, and *Morrison-Knudsen* cases above. Construction of a stationary object, such as a dry dock or dam, is more "local" and less "maritime" in nature than the construction of a vessel which has been launched but not completed. Compare *Cope* v. *Valette Dry Dock Co.*, 119 U.S. 625 (a dry dock is not within admiralty jurisdiction), with *Tucker* v. *Alexandroff*, 183 U.S. 424 (a structure becomes a ship, subject to admiralty jurisdiction, when launched). Thus, the *McManigal, Newport News,* and *Morrison-Knudsen* cases, as well as the *Dixie Sand* case, all hold that injuries within the "local concern" doctrine, and therefore within state compensation acts, are still within the coverage of the Longshoremen's Act.

5. The Administrative Practice Under The Act Is Inconclusive

The court of appeals placed considerable reliance on what it stated had been the administrative practice of the Deputy Commissioners, prior to 1959, to deny claims for compensation under the Longshoremen's Act by employees injured upon navigable waters while engaged in the construction of new vessels (R. 44–45). It is true that in 1927 an opinion of the Bureau of Employee's Compensation stated that injuries to employees "engaged in the construction of a vessel on land ways" were not within the coverage of the Longshoremen's Act (Opinion No. 7, September 2, 1927; see the Appendix, *infra,* pp. 83–84) [29] and that this ruling was apparently fol-

[29] The Bureau's practice of issuing opinions was discontinued in 1928.

lowed until 1959 (see the Appendix, *infra*, p. 88). The ruling, however, made no reference to the legislative history and acknowledged that there was "little justification" for the distinction, which it drew, between the repair and construction of a vessel. Moreover, the ruling clearly did not cover the situation presented here. Instead, it expressly applied to vessels which were on "land ways," *i.e.*, marine ways, prior to being launched, and the fact that admiralty jurisdiction attaches to vessels "when launched" was expressly recognized.

The only reported judicial decision which involved the denial by a Deputy Commissioner of a claim for recovery based on an injury on navigable waters was in *Taylor* v. *Lawson*, 60 F. 2d 165 (E.D. S.C.). The district court reversed the Commissioner's rejection of a claim for an injury sustained while the employee was working on the construction of a vessel which had been launched. The Fourth Circuit, however, reversed the district court. *United States Casualty Co.* v. *Taylor*, 64 F. 2d 521, certiorari denied, 290 U.S. 639. Any administrative practice since that time, must have been based, at least in part, upon that decision, which the court below recognized, is "no longer followed" in the court which rendered it (R. 53). See *supra*, pp. 66–67.[30]

[30] Since the employer in *Taylor* only built vessels and did not repair them, the position taken by the Deputy Commissioner in *Taylor* was not necessarily inconsistent with the positions taken by the Deputy Commissioners in these cases. 64 F. 2d at 525. Where the employees performed both construction and repair work, as here, their contracts are clearly maritime, while if they do only construction work, their contracts may

Except for the initial decision of the Deputy Commissioner in one of the two instant cases, we have found no other cases, except the discredited *Taylor* decision, in which a denial of a claim by a Deputy Commissioner for injury to a construction worker upon navigable waters had been challenged in the courts. Moreover, we have been unable to determine how many, if any, such claims have been denied administratively and not been individually challenged since that date, or since the authoritative interpretation of the Act by the Court in *Davis, O'Rourke,* and *Avondale Marine Ways, supra.* See Appendix, *infra,* p. 86. Thus, the administrative practice under the Act is, even if construed most strongly for respondents, inconclusive.

But even if the administrative practice were far clearer and stronger than it is in fact, we do not believe that this should prevent the removal of such anomolies as denying claims for injuries upon navigable waters within the admiralty jurisdiction occurring in the construction of vessels, while grant-

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be non-maritime. Since the non-maritime nature of the contract is one of the factors making the "local concern" doctrine applicable (see *infra*, pp. 75–76), it may be that the situation in *Taylor* was "clearly" within the "local concern" doctrine as defined by the pre-1927 cases. Therefore, under the reasoning of court below—that the Act excludes all injuries "clearly" within the "local concern" doctrine under the pre-1927 cases—the *Taylor* case was correctly decided. Here, on the other hand, even if we accept the standard of the court below, the "local concern" doctrine is not "clearly" applicable (see *infra*, pp. 74–80) and thus the case falls within the "twilight zone" where the claimant may elect to proceed under either the federal or state statute.

ing similar claims to the same employees for injuries incurred in the repair of completed vessels. A prior administrative ruling does not foreclose a change in interpretation, particularly where the change is made to correct a clear error in construing the Act. *Avondale Marine Ways* v. *Henderson*, 346 U.S. 366; *Automobile Club of Michigan* v. *Commissioner*, 353 U.S. 180; see also *Helvering* v. *Wilshire Oil Co.*, 308 U.S. 90. For example, prior to the Court's decision in *Avondale Marine Ways*, the government had accepted the decision of the Court of Appeals for the Third Circuit in *Norton* v. *Vesta Coal Co.*, 63 F. 2d 165, that injuries upon marine railways are not within the coverage of the Longshoremen's Act. Brief for Petitioner in No. 178, Oct. Term 1933. As a result of that acceptance the Court dismissed the previously granted writ of certiorari. 291 U.S. 641. This history, however, did not preclude the subsequent adoption of the contrary position by the Court in *Avondale Marine Ways* (see *supra*, pp. 55–56).

6. Section 5 of the Act Does Not Make State Compensation Laws the Exclusive Remedy Whenever They Apply

Section 5 (33 U.S.C. 905) states that the employer's liability under the Act is "exclusive." If this Section 5 were read literally it would mean that, in situations where both federal and state compensation acts could constitutionally apply, the state laws would no longer be applicable. Thus, the "local concern" doctrine would be in effect wholly rejected. But it is clear that Section 5 was intended merely to substitute compen-

sation under the Act for liability at common law or in admiralty. Like most of the rest of the Act, it was modeled upon a similar provision in the New York workmen's compensation act (see *supra*, p. 31) which presumably did not relate to the problem of conflicting state and federal jurisdiction—particularly since a state statute could not provide an exclusive remedy for an injury within federal jurisdiction. Moreover, there is nothing in the Congressional reports or debates to indicate that Section 5 was designed to foreclose recovery under state workmen's compensation acts.

While Section 5 does not, in our view, affect the applicability of state compensation laws, it is even clearer that it does not exclude coverage under the federal Act whenever a state law is applicable. There is nothing in the language of Section 5—which makes the federal Act the exclusive remedy—or in its legislative history to indicate that Congress intended the state acts to provide the exclusive remedy where the "local concern" doctrine of admiralty law would permit them to apply. If Section 5 were construed to bar application of the federal Act where state compensation acts were also applicable, this construction would be directly inconsistent with this Court's decisions in *Davis* and *Avondale Marine Ways*. Section 5 of the Longshoremen's Act must be read as simply providing that liability under the Act is in lieu of the liability imposed by common law and admiralty, and, in addition, that liability under state law is barred where the employee has elected to receive compensation under the Longshoremen's Act and the employer

has furnished it. See *Hahn* v. *Rock Island Sand & Gravel Co.*, 358 U.S. 272.

B. EVEN IF COVERAGE UNDER THE LONGSHOREMEN'S ACT DOES NOT EXTEND TO ALL INJURIES UPON NAVIGABLE WATERS WITHIN ADMIRALTY JURISDICTION, THE ACT APPLIED HERE BECAUSE THE INJURIES WERE WITHIN THE "TWILIGHT ZONE"

In our view, as we have contended above (pp. 23–74), the Longshoremen's Act, as shown by its history and the decisions of this Court, covers all injuries upon navigable waters within admiralty jurisdiction (with only two express exceptions), regardless whether such injuries were "clearly" compensable under state workmen's compensation acts under the "local concern" doctrine of admiralty law. Here we show that even if "clear" cases of "local concern" are not within the coverage of the Longshoremen's Act, the Act properly applied to the cases at bar, since these cases were far from clear and well within the area of legitimate doubt known as the "twilight zone."

1. There Is Substantial Doubt Under the Pre-1927 Precedents Whether State Workmen's Compensation Acts, as Supplementing Admiralty Law Under the "Local Concern" Doctrine, Would Apply to These Cases

The court of appeals below (R. 46–47) treated the injuries in these cases as clearly within the "local concern" doctrine under the pre-1927 cases, on the basis of *Grant Smith-Porter Ship. Co.* v. *Rohde*, 257 U.S. 469 (see *supra*, pp. 27–28). The decision in that case was based upon three factors: first, the employee's contract with his employer was held to be non-maritime because it related only to shipbuilding and incorporated

the state elective-type workmen's compensation; second, the employee's general employment had no direct relation to navigation or commerce; and third, his activity at the time of his injury was "local" in nature and had no direct relation to navigation or commerce. *Id.* at 475–476.

One of these three crucial elements is missing in the present cases. Whatever the situation in *Rohde*, the employees' contracts of employment in these cases cannot be considered as non-maritime. Since the employees were concededly subject to the Longshoremen's Act, there is no indication that the parties contracted with reference to the state workmen's compensation Act, as they had done in *Rohde*. Similarly, unlike the employer in *Rohde*, the employers here engaged in both the repair of completed vessels and the construction of new ones, and the employees here were engaged for both types of work.[31] Neither *Rohde*, nor any of the other pre-1927 "local concern" cases in this Court, dealt with employees who were employed both for repair and construction work, and were injured upon navigable waters at a time when they were engaged in the completion of a new vessel.[32] Recently

[31] Roger McGuyer was apparently expected to work interchangeably on new construction and repair projects (R. 29–30, 44). Although Minus Aizen was employed principally for new construction, he would be required on occasion to engage in repair work, although he had not done so in the few months of his employment prior to his injury (R. 87–88).

[32] Several pre-1927 cases made clear that state workmen's compensation acts could not apply under the "local concern" doctrine to injuries to repairmen occurring while they were working on completed vessels. *Great Lakes Dredge & Dock Co.* v. *Kierejonski*, 261 U.S. 479; *Gonsalves* v. *Morse Dry Dock Repair Co.*, 266 U.S. 171; *Robins Dry Dock & Repair Co.* v. *Dahl*, 266 U.S. 449 (see *supra*, pp. 29–30).

this Court held in *Pennsylvania R.* v. *O'Rourke*, 344 U.S. 334, 341–342, that the locus of the accident was controlling, regardless of the employee's activity at the moment of his injury, so long as the employer had employees engaged in maritime employment upon navigable waters. This case demonstrates the distinction between the cases at bar, where the employees engaged in repair work which was maritime employment, and the *Rohde* and other pre-1927 "local concern" decisions, where they engaged only in construction work which was held to be non-maritime. In short, the pre-1927 "local concern" cases revealed only that the application of that doctrine required a painstaking factual analysis of the impact in each case of state law on the uniformity constitutionally required.

In a case decided shortly after passage of the Longshoremen's Act, this Court did consider the issue whether workers employed both for repair and construction work came within the "local concern" doctrine when injured while they were engaged in the latter activity. In *Baizley Iron Works* v. *Span*, 281 U.S. 222, decided three years later, the Court held that an employee engaged primarily in work which was "local" in nature was still not covered by a state workmen's compensation law under the "local concern" doctrine, if his activity at the moment of injury was the maritime work of repairing a vessel. The Court in dictum appeared to suggest the contrary result—that the "local concern" doctrine would apply—where an employee, who engaged in both repair and construction work, was hurt doing con-

struction work. There is no reason to believe that Congress in 1927 could have and did anticipate this dictum, in view of the fact that the "local concern" cases turned upon their particular facts. See also *Messel Foundation Co.*, 274 U.S. 427, discussed *supra*, pp. 30–31.

In short, the pre-1927 precedents provide no clear guide for determining whether the injuries here were compensable under state workmen's compensation acts through the "local concern" doctrine, or were, like injuries occurring during the repair of completed vessels, exclusively under federal maritime law. Therefore, even if the court of appeals below were correct in believing that the "twilight zone," where both federal and state compensation acts were applicable, does not extend to cases clearly within the pre-1927 "local concern" precedents, the "twilight zone" does cover the cases at bar. For the pre-1927 precedents left room for reasonable and substantial doubt as to whether the "local concern" doctrine would permit recovery under local workmen's compensation acts for the injuries here.

2. Since the Legislative History of the Act and the Post-1927 Decisions of this Court, as well as of the Court of Appeals for the Fifth Circuit, Provided a Reasonable Basis for Believing That the Injuries Here Are Covered by the Longshoremen's Act, They Are Within the "Twilight Zone" of Overlapping Coverage

The decisions of this Court make it clear that the area of legitimate doubt concerning the coverage of federal and state compensation acts, *i.e.*, the "twi-

light zone," is not defined merely by determining whether there was doubt in 1927 under the pre-1927 precedents. Compensation under the Longshoremen's Act has been upheld as within the "twilight zone" in a situation where, prior to 1927, it was clear that workmen's compensation benefits could validly be provided by state law (compare *Industrial Commission* v. *Nordenholt Corp.*, 259 U.S. 263, with *Avondale Marine Ways* v. *Henderson*, 346 U.S. 366 (see *supra*, pp. 55–56)); and, conversely, compensation awards under state workmen's compensation acts have been upheld, as within the "twilight zone," for injuries which, prior to 1927, would have been within the exclusive domain of federal maritime law (compare *Gonsalves* v. *Morse Dry Dock & Repair Co.*, 266 U.S. 171, and *Robins Dry Dock & Repair Co.* v. *Dahl*, 266 U.S. 449, with *Bethlehem Steel Co.* v. *Moores*, 335 U.S. 874, and *Kaiser Co.* v. *Baskin*, 340 U.S. 886 (see *supra*, pp. 52–55)). Thus, the question is whether there was legitimate doubt as to the coverage of federal and state acts at the time of the injury and claim.

We believe, as we have contended above (pp. 23–74), that the legislative history of the Longshoremen's Act and the post-1927 precedents in this Court indicate that the Act covers all injuries, such as those here, occurring on navigable waters within admiralty jurisdiction. Even if we are incorrect in that regard, however, we think it beyond dispute that the legislative history and the prior decisions of this Court provided a

reasonable and substantial basis for the claims asserted by the claimants in these cases for injuries occurring within admiralty jurisdiction. No more need be shown to bring the injuries within the "twilight zone." *Moore's Case*, 323 Mass. 162, 167, 80 N.E. 2d 478, affirmed *sub nom. Bethlehem Steel* v. *Moores*, 335 U.S. 874.

But in the cases at bar more was shown. The Court of Appeals for the Fifth Circuit had ruled that cases within the "local concern" doctrine were nevertheless within the coverage of the Longshoremen's Act. *De Bardeleben Coal Corp.* v. *Henderson*, 142 F. 2d 481, 484; *Continental Casualty Co.* v. *Lawson*, 64 F. 2d 802, 804, 805. The only possible notice (prior to the decisions below) that lawyers practicing within that circuit had of a possible change of interpretation of the coverage provisions of the Act by the Fifth Circuit was a dictum contained in a footnote in *Flowers* v. *Travelers Insurance Co.*, 258 F. 2d 220, 222, note 5, certiorari denied, 359 U.S. 920. That footnote, however, did not cover the cases here, since it merely stated that the Act would not apply to "work on an uncompleted hull before it has become a ship" (*ibid.*), and it has long been settled that a hull becomes a ship subject to admiralty jurisdiction once it has been launched, even though it has not been completed. *Tucker* v. *Alexandroff*, 183 U.S. 424.[33] The claimants'

[33] The court of appeals below was of the view that *Thames Towboat Co.* v. *The Schooner "Francis McDonald"*, 254 U.S. 242, 244, "sharply restricted the *Tucker* case" (R. 54). However, the latter case merely held that a contract for the completion of a

reliance upon the prior rulings of the Court of Appeals for the Fifth Circuit was all the more reasonable in light of the unanimous opinion of the commentators and other courts that an election by a claimant to receive compensation under the Act for an injury upon navigable waters within admiralty jurisdiction would be sustained. See *supra*, p. 66.

Indeed, it is difficult to see how the court of appeals below could view these cases as *clearly* within the exclusive coverage of state law under the "local concern" doctrine. It is even more difficult to understand that characterization, when two Deputy Commissioners found the injuries within the coverage of the Longshoremen's Act, and two experienced trial court judges agreed. The "twilight zone" must extend to these cases, in order to protect the reasonable reliance of the claimants and to avoid the very dilemma for claimants which gave birth to this Court's decision in *Davis* v. *Department of Labor*, 317 U.S. 249.

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vessel which has been launched is not a maritime contract, although the work is to be performed on navigable waters.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgements of the court of appeals should be reversed, and the judgments of the district courts reinstated.

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MARCH 1962.

APPENDIX

Opinion No. 7, September 2, 1927

Employees engaged in the construction of a vessel in a dry dock or marine way are not engaged in maritime employment as that term is used in the longshoremen's and harbor workers' compensation act.

The question submitted is whether employees engaged in the construction of a vessel on land ways built on privately owned property in Tenn see have the right to claim compensation under the Tennessee compensation law or under the longshoremen's and harbor workers' compensation act.

The commission, in an opinion approved August 12, 1927, has held that a marine railway is a dry dock within the meaning of that term as used in the longshoremen's act. The courts have consistently held that a contract for the construction of a vessel is not a maritime contract. (Thames Towboat Company v. The Francis McDonald, 254 U.S. 242, and cases cited.) It is equally well settled that a contract for repairs to a vessel is a maritime contract. (Robins Dry Dock and Repair Co. v. Dahl, 266 U.S. 449.) It has also been held that a vessel becomes such when launched and is thereafter liable for maritime torts. (Grant Smith-Porter Co. v. Rohde, 257 U.S. 469.)

While there may be little justification from either an employee's or an employer's standpoint in drawing a distinction between the rights of an employee while engaged in the construction of a vessel in a dry dock and while engaged in the repair thereof in the

same dry dock at a later date, the decisions require that such distinction be made.

The United States Employees' Compensation Commission therefore will take no action under the longshoremen's act against an employer engaged only in the construction of vessels who does not comply with the act, nor against any employer engaged in the construction and repair of vessels who secures payment of compensation to employees while employed on repair work on a vessel in a dry dock or on marine ways.

U.S. DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION
WASHINGTON 25, D.C.

January 25, 1962

Mr. Louis V. Nelson
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Dear Mr. Nelson:

This is in response to your letter of January 11, 1962, in which you inquire concerning the Bureau's "administrative rulings regarding injuries upon new ship construction" in connection with administration of the Longshoremen's and Harbor Workers' Compensation Act. This apparently is in connection with a case which you have pending in the United States Supreme Court.

The Bureau (created in 1946 as successor to the United States Employees' Compensation Commission) does not issue "rulings" which determine the rights and obligations of parties in individual cases. The various deputy commissioners of the Bureau assigned

to the several compensation districts have the authority under the law to determine the legal and factual issues in each case under their jurisdiction. As stated, there is no general determination by the Bureau of individual rights and obligations.

A summary of this matter prepared by the legal staff of the Bureau shows that when the Longshoremen's Act was first enacted in 1927, the Employees' Compensation Commission issued "opinions." (The first opinion was issued on August 12, 1927, and the last, the thirty-third, on February 25, 1928.) They were issued in the absence of and until court decisions could construe the law. They were not "decisions" or "rulings." As a matter of fact, some of them subsequently were found to be inconsistent with the courts' rulings upon the same issue. For example, on February 25, 1928, an opinion was rendered that a woman living as the common-law wife of the deceased employee was entitled to compensation as his "surviving wife" notwithstanding that the state where the parties lived did not recognize common-law marriage. However, *Bolin* v. *Marshall*, 76 F. 2d 668 (C.A. 1935), held contra with reference to a common-law relationship in Oregon. It would also appear from this case that the "opinion" of the Commission of February 25, 1928, had been considered only as such by the deputy commisioner in the *Bolin* case since he had rejected the claim of the alleged widow for compensation contrary to the Commission's opinion.

With reference to the status of employees working on the construction of a vessel, the Commission on September 2, 1927, failing to distinguish between "contracts" and "injuries", opined that because "the courts have consistently held that a contract for the construction of a vessel is a non-maritime contract"

an injury to an employee engaged thereunder, notwithstanding that the injury occurred upon navigable waters of the United States where Admiralty law applies in the case of injury, was not within the coverage of the Longshoremen's Act. The same opinion stated that an injury to an employee engaged under a contract for the repair of a vessel would be covered although "there may be little justification * * * in drawing [such] distinction."

The deputy commissioners apparently continued to be guided by this opinion, which as stated above was not a rule or decision, until approximately 1959. The word "apparently" is used because there is no readily available method of ascertaining in how many cases the deputy commissioners actually rejected a claim for compensation because the injury was sustained while helping to construct a vessel or whether in some cases they awarded compensation in similar circumstances. No statistics are kept as to this. Only a search through the individual cases of the several deputy commissioners which run into the many thousands would elicit such information. It would not be feasible to undertake a study of this kind and it is noted that you desire the information at the earliest convenience.

You are aware, of course, of the case of *Taylor* v. *Lawson*, 60 F. 2d 165, wherein the United States District Court reversed the deputy commissioner's rejection of a claim for injury sustained while working upon the construction of a vessel, which judgment in turn was reversed by the United States Court of Appeals in 64 F. 2d 521.

When the Supreme Court in *Parker* v. *Motor Boat Sales, Inc.*, 314 U.S. 244, and more emphatically in *Pennsylvania Railroad Company* v. *O'Rourke*, 344 U.S. 334, held that maritime employment of the injured employee was not the *sine qua non* of applica-

bility of the Longshoremen's Act, provided the injury occurred upon navigable waters of the United States, the question of the correctness *vel non* of the earlier opinion was considered. It was concluded that injury upon navigable waters of the United States combined with maritime employment as to "any employees" of the employer (as defined in Section 2(4) of the Longshoremen's Act, 33 U.S.C. Sec. 902(4)) was sufficient to bring the case under the Act since the requirement of maritime employment as to the injured employee himself is nowhere provided in the Act. Whether "maritime employment" (either as to the injured employee or any other employees of the employer) is a condition precedent to recovery under the Act has been questioned. *Ford* v. *Parker*, 52 F. Supp. 98 (Md. 1943).

It is hoped that the above gives you the desired information.

Very truly yours,

WM. MCCAULEY, *Director.*

CC: U.S. Department of Justice
Washington 25, D.C.
Attn: Mr. Morton Hollander, Civil Division

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 532

C. D. CALBECK, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

versus

THE TRAVELERS INSURANCE CO. and LEVINGSTON SHIPBUILDING CO.

P. J. DONOVAN, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

versus

AVONDALE SHIPYARDS, INC.

On Writ of Certiorari to The United States Court of Appeals For the Fifth Circuit

BRIEF AMICUS CURIAE, ON BEHALF OF MINUS AIZEN, INJURED CLAIMANT IN DONOVAN versus AVONDALE.

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INDEX

	Page
Statement of Position	2
Summary of Argument	2
Argument:	
The Longshoremen's and Harbor Workers' Compensation Act is applicable to all injuries incurred on navigable waters by employees whose employer is engaged in maritime employment, regardless of the particular job in which the injured employee was engaged at the time of his accident	4
Even if the Federal Compensation Act is not the exclusive remedy of the injured employee in this case, its facts are such that he should have a choice of remedies pursuant to the "Twilight Zone" principles previously enunciated by this Honorable Court	8
Conclusion	12
Certificate	12

CITATIONS

	Page
Cases:	
Carlin Construction Co. v. Heaney, 299 U.S. 41 (1936)	6
Crowell v. Benson, 285 U.S. 22 (1932)	7
Davis v. Department of Labor and Industries, 317 U.S. 249 (1942)	4, 6, 7, 8, 11
Grant Smith-Porter Ship Co. v. Rhode, 257 U.S. 469 (1922)	3, 8, 10
Jeffers v. Foundation Co., 85 F. 2d 24 (2d Cir. 1936)	6
New Amsterdam, 87 F. 2d 24 (2d Cir. 1936)	6
Parker v. Motor Boat Sales, Inc., 314 U.S. 244 (1941)	6
Pennsylvania Railroad Co. v. O'Rourke 34 U.S. 334 (1956)	3, 7
Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917)	2, 4, 5
Sultan Ry. & Timber Co. v. Department of Labor, 277 U.S. 135 (1928)	6
Thibodeaux v. J. Ray McDermott & Co., 276 F. 2d 42 (5th Cir. 1960)	6
Union Oil Co. v. Pillsburg, 63 F. 2d 925 (9th Cir. 1933)	6
Miscellaneous:	
1 Larson, Workmen's Compensation	5

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---

BRIEF, AMICUS CURIAE, ON BEHALF OF MINUS AIZEN, INJURED CLAIMANT IN DONOVAN versus AVONDALE.

MAY IT PLEASE THE COURT:

STATEMENT OF POSITION

This brief is submitted on behalf of Minus Aizen, the totally and permanently disabled young man who was the beneficiary of the compensation award made by the Honorable P. J. Donovan, Deputy Commissioner, who is now one of the petitioners before this Honorable Court.

It is Minus Aizen's position that the judgments of the Court of Appeals should be reversed and that the judgments of the District Courts should be reinstated.

SUMMARY OF ARGUMENT

POINT I

In 1917 this Honorable Court held in *Southern Pacific Co. v. Jensen* (244 U. S. 205) that the survivors of longshoremen killed on navigable waters could not recover under a state workmen's compensation act. Since there was then no federal compensation statute, the effect of the *Jensen* case was to deprive certain employees of any compensation remedy. In order to partially rectify this situation, the Court adopted a so-called "local concern" doctrine which had the effect of making the state compensation acts applicable to some injuries which did, in fact, occur on navigable waters. With the enactment of the Longshoremen's and Harbor Workers' Compensation Act in 1927, however, employees injured on navigable waters were given a uniform federal compensation remedy. Thus, the necessity for utilizing the "local concern" exception to the rule of *Jensen* disappeared.

Since this "local concern" doctrine was not incorporated into the federal statute, and since the doctrine has now outlived its *raison d'etre*, the nature of an injured *employee's* duties is not relevant to a determination of his compensation rights.

It seems not unlikely that these considerations — absence of a "local concern" doctrine in the federal act and the absence of any present necessity for such a doctrine — prompted the decision of this Honorable Court in *Pennsylvania Railroad Co. v. O'Rourke* (344 U.S. 334) wherein it was clearly held that there are now only two requisites to the application of the Longshoremen's and Harbor Workers' Compensation Act: (1) that the *injury* be incurred on *navigable waters* of the United States; and (2) that the *employer* be engaged in "*maritime employment*".

Notwithstanding the presence of both of these criteria in the instant case, the Court of Appeals for the Fifth Circuit has held that the federal compensation statute cannot apply to the claims of Minus Aizen. This holding, we submit, is contrary to the *O'Rourke* decision and, therefore, is erroneous.

POINT II

The appellate opinions below are predicated upon the 1922 decision of this Honorable Court in *Grant Smith-Porter Ship Co. v. Rhode* (257 U. S. 469). In that case, the Court held that a carpenter, who had contracted with his employer to construct a vessel and to accept state compensation benefits in the event of injury, was relegated to recovery under the state act for injuries incurred upon navigable

waters in the course of his employment. The facts of the instant cases are so materially different from those in *Rhode* that the latter case should not control the result in the instant cases which involve employers engaged in substantial maritime activities and do *not* involve any pre-injury contracts requiring the employees to accept state compensation benefits in the event of injuries on navigable waters.

Moreover, these distinguishing factors in the instant cases affect them with such a "maritime flavor" that they fall within the principle of *Davis v. Department of Labor and Industries* (317 U. S. 249) which allows claimants a *choice* between state and federal compensation remedies.

ARGUMENT

POINT I

THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT IS APPLICABLE TO ALL INJURIES INCURRED ON NAVIGABLE WATERS BY EMPLOYEES WHOSE EMPLOYER IS ENGAGED IN MARITIME EMPLOYMENT, REGARDLESS OF THE PARTICULAR JOB IN WHICH THE INJURED EMPLOYEE WAS ENGAGED AT THE TIME OF HIS ACCIDENT.

The seeds of the present controversies were sown by the landmark decision of this Honorable Court in the case of *Southern Pacific Co. v. Jensen* (244 U. S. 205), in which it was held that since the injuries from which a workman died were sustained aboard a vessel afloat in navigable waters, his survivors could not recover against his employer under a state workmen's compensation act. The effect of

the *Jensen* decision in 1917 was to deprive certain workmen of a compensation remedy for injuries incurred on navigable waters since there was no uniform federal compensation statute at that time. The result which *Jensen* brought about came at a time when the workmen's compensation concept in the United States was in its ascendency, for it was between 1910 and 1920 that workmen's compensation legislation was enacted in all but eight states. 1 Larson, Workmen's Compensation §5.30 (1952).

Although *Jensen* rested upon solid constitutional grounds, the decision nevertheless was contrary to the prevailing policy of the times: to provide compensation coverage to workmen in all types of hazardous employments.

Therefore, in the years prior to 1927, there was ample reason for adopting some concept which would broaden the application of workmen's compensation coverage and still operate within the constitutional limitations which the *Jensen* decision recognized. The concept which seems to have lent itself best to the accomplishment of the goal of molifying the effects of *Jensen* is the idea of allowing the state compensation statutes to apply whenever it could be said with reason that the subject matter out of which the injury arose was principally of "local concern", not involving any national activity and not in conflict with any federal law on the same subject.[1]

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[1] The local concern doctrine was actually suggested by the *Jensen* Opinion itself when it stated that no state legislation can be upheld if it "works material prejudice to the characteristic feature of the general maritime law or interferes with proper harmony and uniformity of that law in its international and interstate relations". Southern Pacific Co. v. Jensen, 244 U. S. 205, 216 (1917).

This means of circumventing *Jensen* served a valuable purpose prior to the enactment of the federal statute. With its enactment, however, a uniform compensation remedy was afforded to workmen for injuries sustained on navigable waters; thus, the sole purpose of the "local concern" doctrine disappeared. Moreover, the government's brief clearly demonstrates that Congress did *not* intend to incorporate the "local concern" doctrine within the federal act since all specific references to the doctrine were deleted from the final draft of the statute. Brief for the Petitioners, pp. 15-16, 31-45.

Although it appears that there are cases in which this Court continued to consider the "local concern" doctrine with regard to injuries occurring on navigable waters *after* the enactment of the federal statute,[2] it is submitted that these decisions have resulted in so much confusion and uncertainty that they support the proposition that the entire "local concern" concept has outlived its usefulness and should be unequivocally abandoned.[3]

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[2] *Compare* Carlin Constr. Co. v. Heavey, 299 U. S. 41 (1936) (land-based construction worker injured on boat while going to work on coastal island); Sultan Ry. & Timber Co. v. Department of Labor, 277 U. S. 135 (1928) (logger injured while assembling log booms on navigable waters); Jeffers v. Foundation Co., 85 F. 2d 24 (2d Cir. 1936) (bridge construction worker standing inside a caisson sunk in river); New Amsterdam, 87 F. 2d 332 (2d Cir. 1937) (lighthouse construction worker injured by fall into lake), *with* Parker v. Motor Boat Sales Inc., 314 U. S. 244 (1941) (janitor fatally injured while placing outboard motor on pleasure craft); Union Oil Co. v. Pillsburg, 63 F. 2d 925 (9th Cir. 1933) (watchman injured on vessel in dry dock).

[3] See discussion in Davis v. Dept. of Labor and Indus., 317 U. S. 249, 252 (1942). It is interesting to observe that the Court of Appeals for the Fifth Circuit through the author of the opinion presently under review has recently referred to this "local concern doctrine" as "somewhat hoary." Thibodeaux v. J. Ray McDermott & Co., 276 F. 2d 42 (5th Cir. 1960).

The first step toward resolution of the unfortunate situation which arose out of the continued application of the "local concern" concept and its illogical offspring, the "twilight zone",[4] was taken by this Honorable Court in 1956 when it decided the case of *Pennsylvania Railroad Co. v. O'Rourke* (344 U. S. 334). In this case the Court plainly held that the applicability of the federal compensation statute did *not* depend *upon the nature of the injured employee's duties*. The sole criteria were: (1) that the *injury* be sustained *on navigable waters* of the United States; and (2) that the *employer* be engaged, through *any* of its employees, *in maritime employment*. If these criteria were met, the federal act was applicable, regardless of the type of activity in which the injured workman was engaged.

The certainty and logic of the *O'Rourke* result revert to the simple precepts upon which the *Jensen* decision rests: if the injury occurs on the water, the maritime law, as now modified by the federal compensation act,[5] applies; if it occurs ashore, the state may provide a remedy.

Applying these simple rules to the instant cases, it becomes apparent that the judgments of the district courts are correct and should be reinstated. Minus Aizen was injured upon navigable waters of the United States while working for an employer with hundreds of employees in maritime employment. Therefore, it is submitted that he is entitled to the benefits of the Longshoremen's and Harbor Workers' Compensation Act.

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[4]Conceived in Davis v. Dept. of Labor and Industries, 317 U. S. 249.
[5]In Crowell v. Benson, 285 U. S. 22 (1932) this Court upheld the constitutionality of the Longshoremen's and Harbor Workers' Compensation Act, as a valid extension and modification of the general maritime law of the United States.

POINT II

EVEN IF THE FEDERAL COMPENSATION ACT IS NOT THE EXCLUSIVE REMEDY OF THE INJURED EMPLOYEE IN THIS CASE, ITS FACTS ARE SUCH THAT HE SHOULD HAVE A CHOICE OF REMEDIES PURSUANT TO THE "TWILIGHT ZONE" PRINCIPLES PREVIOUSLY ENUNCIATED BY THIS HONORABLE COURT.

The opinions below rest primarily upon the appellate court's interpretation of a 1922 decision of this Honorable Court in the case of *Grant Smith-Porter Ship Co. v. Rhode* (257 U. S. 469). The decision in *Rhode*, according to the Court of Appeals, *precludes* the application of the Longshoremen's and Harbor Workers' Compensation Act to the instant cases even under the "twilight zone" principle of *Davis v. Department of Labor and Industries* (317 U. S. 249). The appellate decisions below seem to be based upon the premise that *Rhode*, once and for all, stands immutably for the proposition that injuries incurred on navigable waters aboard a launched, floating, but incomplete, vessel are solely within the jurisdiction of the state in which such injuries occur.

As has been previously submitted, had the *Rhode* case arisen *after* the passage of the Longshoremen's Act there would have been no need to resort to a state act in order to insure a compensation remedy. However, assuming that the state compensation act would have been applied in *Rhode*, notwithstanding the existence of a federal act, the facts and circumstances in the *Rhode* case are not sufficiently identical to those of the instant cases so as to de-

prive the instant claimants of their awards under the Longshoremen's and Harbor Workers' Compensation Act.

In the first place, the employer in *Rhode* was apparently engaged solely in the *construction* of vessels. Whereas, in the instant cases the employers were engaged extensively in the classic maritime activity of ship repair, as well as in new construction. Therefore, the activities of the employers in these cases were at least as much maritime as they were "local".

Secondly, and most significantly, the *Rhode* decision dealt with a rather unique situation — not present in the instant cases — in which there was a definite pre-injury *contractural* agreement between the parties as to what law should govern their rights and liabilities in the event of the employee's injury.

In *Rhode*, therefore, this Court was construing the enforceability of a voluntary contract between the injured workman and his employer. This was a contract which had been consciously made with specific reference to the laws of the State of Oregon.

This clearly appears from the following portion of the Court's opinion:

> "Prior to the time of injury, neither . . . the employer . . . nor the workman had notified the appropriate state authority of any rejection of the Workmen's Compensation Act [of Oregon], and up to the time of injury there had been deducted and paid over to the commission . . . payments from

> wages earned and paid . . . the workman . . ." (257 U. S. at page 475)

Upon the basis of these particular facts, the Court reasoned that:

> "It cannot be properly said that they consciously contracted with each other in contemplation of the general maritime law." (257 U. S. at page 476)

And, in fact, the Court then concluded that:

> ". . . the parties contracted with reference to the state statute." (257 U. S. at page 477)

Thereupon, and, we submit, only for this reason, the Court felt that:

> "Under such circumstances regulation of the rights, obligations and consequent liabilities of the parties, *as between themselves*, by local rule would not *necessarily* work material prejudice to any characteristic feature of the general maritime law. . . ." (257 U. S. at page 476) (Emphasis added)

Minus Aizen, however, did not contract with his employer "to build a ship". Nor did he agree in advance of his injuries to receive the meagre benefits of the Louisiana compensation laws if he was injured upon navigable waters of the United States in the course of his employment. Aizen's duties, under his employment contract, may be seen from the record:

> "Notwithstanding that Aizen worked solely on new construction and performed no work on repair jobs, other workmen in particular crafts assigned to work on repair of vessels did on rare occasions perform work on new construction. . . . *The same is true* for workmen engaged in new construction of vessels." (Emphasis added.) (R. 87-88).

There was no agreement, or practice, from which to infer that the employees' work was to be purely "local".

Therefore, since the activities of the employer in the *Rhode* case were apparently different from those of the instant employers and since the employment contract in *Rhode* was made with specific reference to state law, whereas, such was not so in the instant cases, it is respectfully submitted that the *Rhode* decision is not, and should not be, dispositive of the instant controversies.

Moreover, assuming that the *Rhode* case is used by analogy to apply the state compensation act to the instant cases, we submit, because of their "maritime flavor", that the facts of the instant cases are enough at variance with those of the *Rhode* case to create a doubt sufficient to bring the instant cases within the "twilight zone" principle of *Davis v. Department of Labor and Industries*, *supra*, and, thus, allow Minus Aizen to choose between a state and federal compensation remedy. Since the federal remedy has been chosen, his compensation award should be reinstated.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgments of the Court of Appeals should be reversed and that the judgments of the District Courts should be reinstated.

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CERTIFICATE

I certify that a copy of the foregoing brief has been served upon opposing counsel of record by placing the same properly addressed in the United States Mail with adequate postage affixed thereto.

Office-Supreme Court, U.S.
FILED
APR 12 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1961

No. 532

C. D. CALBECK, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

versus

THE TRAVELERS INSURANCE CO. and LEVINGSTON SHIPBUILDING CO.,

Respondents.

P. J. DONOVAN, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

versus

AVONDALE SHIPYARDS, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR THE RESPONDENT, AVONDALE SHIPYARDS, INC.

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SUMMARY OF ARGUMENT

PAGE

Introduction 1

Argument

1. Coverage under the Longshoremen's and Harbor Workers' Act may be afforded only if recovery for the disability may not validly be provided by State Workmen's Compensation Law 5
2. The legislative and judicial background of the Harbor Workers' Act requires an interpretation that jurisdiction to grant an award under the Act be declined in a case involving a new construction worker 9
3. The contemporaneous construction of the Harbor Workers' Act is to the effect that new construction workers are not covered thereby 16
4. *Parker v. Motor Boat Sales, Inc.* and *Pennsylvania RR. Co. v. O'Rourke* are distinguishable and are not *contra* the position taken herein 18
5. This case does not fall within the doctrine of the "Twilight Zone" 20
6. The acceptance of benefits under the Louisiana State Compensation Act by the claimant herein effectively constitutes an election of remedies, if alternative remedies were available, and bars prosecution of a claim under the Harbor Workers' Act 25

Conclusion 26

TABLE OF AUTHORITIES CITED

Cases: PAGE

Baskin v. Industrial Accident Commission, 89 Cal. App. 2d 632, 201 P. 2d 549, rev. and rem. 338 U.S. 854; Opinion on remand 97 Cal. App. 2d 257, 217 P. 2d 733, aff. 340 U.S. 886 23, 24

Crowell v. Benson, 285 U.S. 22 9

Davis v. Department of Labor, 317 U.S. 249 9, 21, 22

Ellis v. Travelers Insurance Co., 244 La. 433, 129 So. 2d 729 24

Flowers v. Travelers Insurance Co., 258 F. 2d 200 25

Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469 1, 6, 7, 10, 14, 23

Hahn v. Ross Island Sand & Gravel Co., 359 U.S. 272 25

Industrial Commission v. Nordenholt Corp., 259 U.S. 263 11

Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 11

Kossick v. United Fruit Co., 365 U.S. 731 9

Moores' Case, 323 Mass. 162, 80 N.E. 2d 478, aff. 335 U.S. 874 23, 24

Newport News Shipbuilding & Dry Dock Co. v. O'Hearne, 192 F. 2d 968 25

Noah v. Liberty Mutual Insurance Co., 267 F. 2d 218 25

Parker v. Motor Boat Sales, Inc., 314 U.S. 244 9, 15, 18, 19, 23

Pennsylvania R.R. Co. v. O'Rourke, 344 U.S. 34 18, 20

Peters v. Veasey, 251 U.S. 121 (142 La. 1012, 77 So. 948) 12

Southern Pacific Co. v. Jensen, 244 U.S. 205 9, 10, 11, 13, 15, 19, 20, 21, 24, 25

United States Casualty Co. v. Taylor, 64 F. 2d 521, cert. den. 290 U.S. 639 6, 16

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Western Fuel Co. v. Garcia, 257 U.S. 233 11

TABLE OF AUTHORITIES CITED—(Continued)

Statutes:

	PAGE
Longshoremen's & Harbor Workers' Act as amended 33 U.S.C. 901 *et seq.*	
33 U.S.C. 903(a)	4, 7, 16
33 U.S.C. 902(3)	7
33 U.S.C. 902(4)	19
Louisiana Workmen's Compensation Act	4

Miscellaneous:

Bureau of Employees' Compensation, Opinion No. 7	16
Bureau of Employees' Compensation, Letter of Jan. 25, 1962	17
Senate Judiciary Committee Hearings	12, 13
S. 2415, 87th Congress, 1st Session	14
Supreme Court Rules, Rule 23(5)	2

IN THE

Supreme Court of the United States

OCTOBER TERM 1961

No. 532

C. D. CALBECK, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

versus

THE TRAVELERS INSURANCE CO. and LEVINGSTON SHIPBUILDING CO.,

Respondents.

P. J. DONOVAN, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

versus

AVONDALE SHIPYARDS, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR THE RESPONDENT, AVONDALE SHIPYARDS, INC.

INTRODUCTION

Basing its opinion on the conceptual ground of the nature of his employment, the court below, following this Court's decision in the *Rohde* case, *infra*, held that the Louisiana Workmen's Compensation Act afforded an exclusive remedy to a new construction worker injured in the course of his employment. The Government seeks re-

versal on the theory that the Longshoremen's and Harbor Workers' Act affords the injured worker an exclusive remedy because of the locale of the accident: over water. Alternatively, it is claimed that the case falls in the "Twilight Zone".

Both of the cases under consideration arose in Louisiana, one in the Eastern District and the other in the Western District. In each case, the Deputy Commissioner held that workers on new construction in shipyards were entitled to the benefits of the Longshoremen's and Harbor Workers' Act to the exclusion of the remedy afforded by the Louisiana State Compensation Act.

By "rare coincidence,"[1] both cases were argued and decided on the same day by the Court of Appeals for the Fifth Circuit. The Government sought *certiorari* in one petition to review both judgments pursuant to this Court's Rule 23(5). Because, however, of there being one issue which is not common to both cases (the question of whether or not in the Avondale case the claimant had made a binding election to take compensation under the State Compensation Act), and because the cases were not consolidated below, separate briefs are being filed on behalf of the separate respondents. This brief will be devoted only to the Avondale case.

Avondale accepts as substantially correct the statement of the case as contained in the Government's brief. Omitted from that statement, however, is the fact that the claim was submitted to the Deputy Commissioner on an agreed Statement of Fact, and that it was stipulated therein that the vessel on which the claimant was working on the date that he sustained his injury was only 57% completed both in man-hours and in dollar value;

[1] Opinion below, R. 43.

that during the entire term of claimant's employment by Avondale, he worked solely on new construction and performed no work on repair jobs; and that all work performed by him was on land except that work which he was performing at the time that he sustained his injury (R. 87, 88).[2]

The Louisiana Workmen's Compensation Act[3] provides compulsory coverage and an exclusive remedy for injuries to all employees engaged in hazardous occupations. New construction of vessels is particularly described as a hazardous occupation. The Louisiana Act is not administered by a Commission, but claims thereunder, if controverted, are made directly in courts of general jurisdiction. No reports or other proceedings are required if the payment of compensation is agreed upon by the employer and the employee.

In the instant case, Avondale commenced the payment of compensation under the Louisiana Act in accordance with its terms, and compensation payments had been made for approximately two years and three months to the claimant at the maximum rate provided for in the Louisiana Act at the time that the claim for compensa-

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[2] Footnotes 24 and 31 on pp. 63 and 75 of the Government's brief are inaccurate. It is implied in the former that there is nothing in the record to indicate that the claimant's contract of employment was different from those of his co-workers insofar as his work on new construction and repair was concerned, and in the latter that the claimant would be required on occasion to engage in repair work. Nothing in the findings supports these statements, and the stipulation of facts is exactly to the contrary as to the latter. (R. 87) The claimant engaged solely and only in new construction work.

[3] Revised Statutes of Louisiana, Title 23:1021 *et seq.* R.S. 23:1035 reads in pertinent part as follows:

> "The provisions of this Chapter shall also apply to every person performing services arising out of and incidental to his employment in the course of his employer's trade, business, or occupation in the following hazardous trades, businesses, and occupations:
>
> "The * * * construction * * * of * * * vessels, boats and other water crafts *(sic)* * * * "

tion under the Federal Act was filed with the Deputy Commissioner. The payments were made by weekly checks which clearly showed on their face that they represented compensation under the State Compensation Act. (R. 89) In addition, Avondale had advanced to the claimant the sum of $3,830.00 upon a plea of financial hardship, such amount to be credited against future compensation payments. Finally Avondale had paid approximately $7,000.00 in medical expenses for account of claimant, although the maximum liability for such expenses under the Louisiana Act amounted only to $2,500.00. In his compensation order, the Deputy Commissioner gave credit to Avondale for the amounts so paid to the same extent as if they had been paid pursuant to an award made by him (R. 93).

At the hearing before the Deputy Commissioner and in the District Court (R. 63), Avondale took the position that by accepting those payments, the claimant had made an irrevocable election of his remedies (in the event that a remedy under the Harbor Workers' Act and a remedy under the State Compensation Act were both available to him), but this point was not reached by the Court of Appeals below for the reason that it held that his sole and exclusive remedy was under the State Act.[4]

In its opinion in the Calbeck-Travelers case, which was the principal opinion below, the Court of Appeals squarely held that new construction work was covered by the State law, that an injury sustained in the course of such employment was excepted from the coverage of the Federal Act by reason of the application of the second condition set forth in Section 3(a) thereof,[5] and that under the facts of the case the "Twilight Zone" doctrine

[4] Opinion below, R. 99.
[5] 33 U.S.C. 903(a).

was not applicable. Accordingly, the respective awards of the Deputy Commissioners as affirmed by the District Courts for the Eastern and Western Districts of Louisiana were set aside.

The matter is now before this Court following the granting of the Government's petition for *certiorari*, limited to the question of whether recovery for injuries sustained by employees working on vessel construction may be afforded under the Longshoremen's and Harbor Workers' Act by reason of such injuries having taken place on the navigable waters of the United States. The question of the finality of the election of remedies made by the claimant in the Avondale case may be beyond the scope of the limited issue presented by the grant of *certiorari*, but obviously enters into the overall picture, and, we submit, should be decided by Your Honors simultaneously with the principal issue involved in the case if it is reached.

ARGUMENT

1.

Coverage under the Longshoremen's and Harbor Workers' Act may be afforded only if recovery for the disability may not validly be provided by the State Workmen's Compensation Law.

The Government for the most part has based its position, we submit, upon a strained interpretation of the judicial and legislative background of the Federal act. To some extent, at least, the same position was urged on the Court of Appeals and was flatly rejected. That Court applied the law as it is written and squarely held that the *situs* of an injury in itself was not determinative of jurisdiction because of the proviso of the Act conditioning such jurisdiction upon the non-availability of a

remedy under the State compensation law. This conclusion is supported by the only two decisions which counsel has been able to find on the precise question presented.

In *Grant Smith-Porter Ship Co. v. Rohde*,[6] which arose prior to the enactment of the Federal act, this Court had presented to it the question of whether or not the Oregon State Compensation Act validly could provide an exclusive remedy to a worker injured on the navigable waters while engaged in construction work on a new vessel. The court held that state compensation was available, because the application of the provisions of a state compensation law under such circumstances

> "would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations."[7]

The only other reported case which we have been able to find arose in the Fourth Circuit Court of Appeals in 1933. It is *United States Casualty Company v. Taylor*.[8] In an able opinion rendered by Judge Soper, speaking for a unanimous court (the other two members of which were JJ. Parker and Northcott), it was held that an employee engaged in work on a newly launched but not yet completed vessel had no remedy for compensation under the Federal Act, because his work was not maritime and because the locality of his injury was not the determining feature involved in the claim.

Numerous decisions, of course, have been rendered by this Court and inferior Federal courts to the effect that ship repair work constitutionally could not be cov-

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[6] 257 U.S. 469.
[7] 257 U.S. 469, 476.
[8] 64 F. 2d 521, *cert.* den. 290 U.S. 639.

ered by a State compensation act because of its effect on the uniformity of maritime law. Repair work, of course, may be performed only on a completed vessel, a thing that has taken its place in the stream of commerce. The distinction between repair work and new construction originally drawn in *Rohde* has never, to our knowledge, been changed, and new construction work historically has been considered as purely local and covered by State law regardless of whether the incident occurred on water or on land.

It is our submission that the position which the Government has taken as to the interpretation of the Congressional hearings on the Federal Act, which are labored at length in its brief, is diametrically opposed to the proper and only interpretation that can be drawn from those Hearings and from the wording of the Act itself.

In no place is the tort jurisdictional concept of the Admiralty made the basis of the remedy afforded by the Act. Such a concept is at variance, for example, with subsection (3) of Section 2,[9] which particularly excludes from its coverage

> "any person engaged by the Master to load or unload or repair any small vessel under eighteen tons net."

Moreover, this classification of employee is eliminated from coverage by Section (3),[10] which provides (apparently to make assurance doubly sure) that

> "No compensation shall be payable in respect of the disability or death of—

[9] 33 U.S.C. 902(3).
[10] 33 U.S.C. 903.

> "(1) A master or member of a crew of any vessel, nor any person engaged by the Master to load or unload or repair any small vessel under eighteen tons net;"

We respectfully submit that these two quotations from the clear and unambiguous language of the law adopted by Congress effectively forecloses the interpretation sought to be placed upon the Act by the Government, and completely destroys the thrust of the argument that all parties other than seamen who are engaged in a maritime occupation and who are employed on the navigable waters are covered. Indeed, it is difficult to understand how the Government can state that Congress "intended the Act to cover employees on navigable waters which, although within the 'local concern' doctrine, would also fall within admiralty jurisdiction, and to exclude only those employees which were within the exclusive jurisdiction of the state."[1] On the contrary, the exclusion from the coverage of the Act under Section 2(3), *supra*, of the small claims which are of only local concern negatives in as clear a manner as possible any thought that the Act covers all persons employed on the navigable waters.

The argument of the Government simply has no basis in fact and for the Court to accept that argument, the interpretation of the Act would indeed be most strained. If the intent of Congress was to base jurisdiction on locale, it would have been so simple to have done so! Neither the legislative nor the judicial background of the law prior to its enactment, nor, indeed, the jurisprudence interpreting it subsequent to its enactment, can serve as a basis for the interpretataion that all workers employed on navigable waters have a remedy thereunder.

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[1] Government's brief, p. 46.

This is particularly true when the background in which the law was considered, hereinafter discussed in detail, is known. That background is as follows.

2.

The Legislative and Judicial Background of the Harbor Workers' Act.

Possibly the most criticized and most cited case which has been decided by this Court in the Twentieth Century is *Southern Pacific Company v. Jensen*, 244 U.S. 205. The three-volume Shepard's United States Citator shows 19 columns of citations of cases referring to *Jensen*. Despite all the adverse criticism of the doctrine there set forth, and despite the numerous opportunities available to this Court to reverse it, the decision has stood the test of time. As late as the Court's last term it was again relied upon and cited with approval in *Kossick v. United Fruit Company*, 365 U.S. 731. Moreover, the Government here does not seek to have *Jensen* overruled.

It is strange in the light of this historical fact that such a great portion of the Government's brief should be devoted to the legislative background of the Harbor Workers' Act. That background has been considered time and again,[12] but a review of the Legislative Hearings and the expressions of the persons testifying thereat can only lead to one conclusion: that the Act was adopted to fit the framework set by *Jensen*, which was fresh in the minds of all concerned and which was the touchstone of the law in this area.

No matter what arguments are made relative to Legislative Hearings, even a cursory reading of the Act shows that Congress intended there to be a place in this

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[12] Cf. *Crowell v. Benson*, 285 U.S. 22; *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244; *Davis v. Department of Labor*, 317 U.S. 249.

field for the exclusive operation of the Federal act and another and different place for the exclusive operation of the compensation laws of the various States.

In the interacting areas of the adjudication of the rights of an injured amphibious worker where paramount jurisdiction over remedies is sometimes vested in the States and at other times in the Federal government, even if the legislative background fades into insignificance, the current jurisprudence in no way supports the Government's position as to the exclusiveness of the remedy afforded by the Harbor Worker's Act simply because of an injury being sustained on water.

Although we can cite no statistics to verify this position, it is submitted that it is a fact well known to all practitioners in this field that since the adoption of the law until very recently, the Deputy Commissioners throughout the country have refused to entertain claims involving injuries sustained by new construction workers. The basis of the refusal, of course, was the decision by this court in *Rohde*.

The Harbor Workers' Act was adopted in the light of the decision in *Jensen*, which precluded the application of the remedy afforded by a State compensation act to a longshoreman injured on the water. The case held unconstitutional the application of a State compensation act to such an employee for the reason that under such circumstances, the act would work

> "material prejudice to the characteristic features of the general maritime law, or interferes with the property harmony and uniformity of that law in its international and interstate relations." [13]

[13] 244 U.S. 205, 216.

The decision was rendered in 1917. Shortly before the rendition of the decision, an attack on the workmen's compensation laws just adopted by various states had been before this Court and the compensation acts of New York, Washington and Iowa had been held constitutional. The "liability without fault" theory was comparatively new at that time, and it is not a coincidence that in its contemporary setting, a serious question as to the availability of the remedy provided by the New York law had been raised in *Jensen*. The holding, however, is firm and unequivocal: the constitutionality of a State compensation act could not be maintained in those areas where the general maritime law would be materially prejudiced, but had to be confined to matters of local concern.

Immediately after *Jensen*, *Western Fuel Company v. Garcia*, 257 U.S. 233, reaffirmed the doctrine in a case involving the application of a State wrongful death statute of limitations urged as a defense to a suit in the admiralty, on the theory that the application of that law would not work material prejudice or interfere with the uniformity and harmony of the maritime law in its practical applications.

Between *Western Fuel* and *Jensen* had come *Rohde*, which squarely held that a new construction worker on an uncompleted vessel was engaged in work purely local in character, and hence could be covered by a State compensation act. Numerous other cases came before the Court in those formative years, including *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, and *Washington v. Dawson*, 264 U.S. 219. In both of those cases, this Court struck down separate attempts by Congress to afford compensation recoveries within the admiralty field. Contrarily, it decided *Industrial Commission v. Nordenholt Corp.*, 259 U.S. 263, permitting the application of a State

compensation law to an injury sustained by a longshoreman on a dock (as distinguished from a ship), and *Peters v. Veasey*, 251 U.S. 121, reversing the Louisiana Supreme Court (142 La. 1012, 77 So. 948), which had held the Louisiana Compensation Act applicable to a longshoreman injured on board ship.

All of these cases and the judicial background of the problem of the application of State compensation laws to maritime workers were, of course, well known to the Congressional Committees studying the problem, and the rules of law set up by those cases were consciously built into the Longshoremen's Act when it ultimately was adopted.

The legislative history must be considered in the framework of the then existing constitutional theories as announced by this Court. Those theories precluded the application of State compensation acts to maritime workers engaged in maritime activities within the admiralty jurisdiction. It was never considered that the Congress would have the power to adopt a national compensation law applicable to building construction in the various states; such a thought, at least in the 1920's, would have been inconceivable. Therefore, Congress felt that its hands were tied in areas of local concern, and that it constitutionally could adopt a Federal system of compensation only for maritime workers. Thus, the application of the law would not adversely affect or interfere with the harmony and uniformity of the admiralty and the "local concern" doctrine would not be affected.

The position of Congress is shown beyond peradventure by the Senate Report on the Harbor Workers' Act made after the Committee had met.[14] The portion

[14] S. Rept. No. 973, 69th Cong. 1st Sess., pp. 16-17.

of the Committee Report which the Government considers pertinent is quoted at pp. 36 and 37 of the Government's brief, but there has been omitted from the quotation the following most important language which clearly shows the intention of the Congress to enact a law based on the jurisprudence commencing with *Jensen*. The omitted portion of the Report, we submit, gives the *coup de grace* to the Government's argument. The following precedes the first set of asterisks appearing in the quotation on page 37 of the Government's brief:

> "The Committee deems it unnecessary to comment upon the modern change in the relation between employer and employees establishing systems of compensation as distinguished from liability. Nearly every State in the Union has a compensation law through which employees are compensated for injuries occurring in the course of their employment without regard to negligence on the part of the employer or contributory negligence on the part of the employee. If longshoremen could avail themselves of the benefits of State compensation laws, there would be no occasion for this legislation; but, unfortunately, they are excluded from these laws by the character of their employment; and they are not only excluded but the Supreme Court has more than once held that Federal legislation cannot, constitutionally, be enacted that will apply State laws to this occupation. (*Southern Pacific Co. v. Jensen*, 244 U.S. 205; *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149; *Washington v. Dawson & So.*, 264 U.S. 219)."

It is submitted that insofar as the legislative background of the Longshoremen's Act is concerned, it is almost inconceivable to believe that the Congress intended to adopt a law which would afford an exclusive remedy to an employee engaged in purely local employment (which would not affect the overall maritime jurisdic-

tion) simply because he happened to have been working over water at the time that he sustained the injury. Such an interpretation completely reads out of the act the condition that it is to be applied only

> "if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law."

If State law validly can provide such a remedy, it excludes the application of the Harbor Workers' Act under the plain and unequivocal words of the latter act. And for the Government to argue that the Legislative History reveals the intent of Congress to provide coverage under the Longshoremen's Act for all injuries to amphibious workers within the locale of the maritime jurisdiction of the United States[15] is simply attempting to torture the plain words of the Act into a meaning which was never intended and which they cannot have.[16]

Since *Rohde*, State compensation acts have been interpreted as being capable of validly providing for a recovery in cases of new construction workers, regardless of the *situs* of the injury, and, accordingly, the application of the Longshoremen's Act to such situations is foreclosed. The Court of Appeals for the Fifth Circuit so held, and its reasoning in arriving at that result, we submit, is unimpeachable.

As we indicated above, viewed in the light of present day constitutional doctrine, the decisions limiting the scope of the application of Federal law in these areas of

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[15] Government brief, p. 43.

[16] Although "One swallow maketh not summer," at least Senator Smith of Massachusetts agrees with the interpretation we are contending for herein. On August 14, 1961, he introduced in the Senate at the First Session of the 87th Congress S. 2415 in an attempt to extend the coverage of Section 3(a) of the Act to cause it to apply to the construction of vessels.

local concern may very well seem strained and not consonant with this Court's recent theories, now completely accepted, of permitting Congressional action in fields of local concern if interstate commerce is affected. However, we are not here reviewing the propriety of the latter jurisprudence.

The issue here is one of statutory interpretation, not constitutional law. Regardless of the soundness of the constitutional issue decided in *Jensen*, the Congress enacted the Harbor Workers' Act in the light of that case, fitting the law with the condition that it was not to be applied in areas of local concern (such as new ship construction). If, therefore, the law had not been enacted and *Jensen* were to be before the Court today, a contrary result could be reached and State law could be applied in all these cases, making unnecessary any Federal act whatever. That, however, is not the situation. This Court is now called upon simply to interpret an existing statute, one which reads plain and clear, particularly when viewed in the light of the then existing jurisprudence. The argument here propounded is buttressed by the decision in *Motor Boat Sales*, discussed *infra*, p. 18 *et seq.*

No case among the many authorities included in the Government's brief has, to our knowledge, held that a new construction worker is covered by the Federal Act. No confusion exists in this field, and were this decree to be reversed and a recovery granted, the effect on the overall situation would simply be to create confusion where it heretofore has not existed. It is true that numerous cases involving "marine ways" have granted recoveries to employees when ostensibly they were high and dry and well away from the water's edge. These cases, however, of which those cited on p. 66 *et seq.* of the Government's brief are representative, involved the inter-

pretation of the word "dry dock" as that word is used in the jurisdictional clause of the Harbor Workers' Act. In other words, were "dry dock" to be held not to include a "marine railway," the decisions would have reached the opposite result. The Act specifically provides, of course, that compensation is payable if "the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) * * * ."[17]

3.

The Contemporaneous Construction of the Harbor Workers' Act.

The Government argues that the administrative interpretation of the Act is inconclusive, but admits that the only decided case (*United States Casualty Company v. Taylor, supra*) subsequent to the enactment of the Harbor Workers' Act involving injuries to a new construction worker denied jurisdiction of his claim. It is submitted that the Commissioner's Opinion No. 7, quoted in full at pp. 83 and 84 of the Government's brief, together with the lack of any reported case involving this situation, leads inevitably to the conclusion that the administrative determinations made by the various Deputy Commissioners were adverse to the position of the Government here, and that the contemporaneous construction of the Act by the parties charged with its administration uniformly was to decline jurisdiction over claims of new construction workers. Indeed, the feeble attempt by the Government to evade the full thrust of Opinion No. 7 by attempting to have it limited to vessels which were being constructed on "land ways" is completely answered and reduced to empty words by the title of the Opinion, which in fact is a syllabus, reading:

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[17] Section 3, 33 U.S.C. 903.

> "Employees engaged in the construction of a vessel in a dry dock or marine way are not engaged in maritime employment as that term is used in the longshoremen's and harbor workers' act."

Needless to say, all vessels are constructed on ways or docks of some sort. The opinion is not conditioned on the question of whether a marine railway is a dry dock or not: it simply states flatly that new construction work is not within the provisions of the Federal act. It unequivocally recites that the Commissioner's opinion was that employees engaged in new construction are not afforded coverage. Far from being inconclusive, therefore, the very lack of case law shows the complete reliance of the Commissioner's offices and claimants' counsel in this field (possibly the most ingenious and resourceful known to our bar) on the State compensation laws as affording the sole remedy for injuries to employees while engaged in new construction.

The letter from the Director of the Bureau of Employees' Compensation dated January 25, 1962, also quoted in the Government's brief, we submit, seems to have no place therein, since it was not included in the record and is not an exhibit in this case. It is private correspondence, but since the Government cites it an authority and argues *a contrario* from it that the administrative practice is inconclusive, the letter should be commented on at the very least. Apparently it is admitted that the Deputy Commissioner throughout the various Compensation Districts were "guided" by the opinion until approximately 1959. If this Court is to rely to any extent on contemporaneous administrative construction, therefore, it would seem that for 32 years, the Commissioner's offices uniformly held that no jurisdiction existed over claims for new construction workers.

Such uniformity of construction by the officials vested with the administration of a law is not lightly to be cast aside.

4.

The Motor Boat Sales and O'Rourke cases.

Apparently the Government's position that this claim is governed by the Federal act stems from its interpretation of the *Motor Boat Sales*[18] and *O'Rourke*[19] cases. Neither, we submit, can be propounded as an authoritative base on which the Government may stand. *Motor Boat Sales* involved a claim for compensation under the Federal act against a small boat retailer. Although customarily employed as a janitor in his employer's store, the claimant's intestate in the course of his employment went out in a small boat on a trip to demonstrate an outboard motor to a prospective customer. Following his death by drowning, a claim was made before the Deputy Commissioner under the Longshoremen's Act and an award was made following findings that death arose in the scope and course of his employment and that at the time of his death the employee was engaged in maritime employment. On appeal to the District Court, the award was affirmed. It was reversed by the Court of Appeals for the Fourth Circuit, which in turn was reversed by this Court.

The rationale of this Court's decision was, first, that the Court of Appeals had erred in upsetting the finding of the Commissioner, based on competent evidence, to the effect that the decedent was acting in the course of his employment, and, second, that the court below had erred in holding that the employment of the decedent was "so local in character" that Virginia validly could have ap-

[18] *Parker v. Motor Boat Sales Inc.*, 314 U.S. 244.
[19] *Pennsylvania R.R. Co. v. O'Rourke*, 344 U.S. 34.

plied its own compensation law. On the contrary, Your Honors found that the decedent was clearly engaged in a maritime activity—acting as a lookout on a vessel under way on the navigable waters—and that the language of the Act defining a covered employer as one whose employees were engaged in "maritime employment, in whole or in part, upon the navigable waters * * * ",[20] obviously dictated that coverage should be afforded.

This Court avoided going into the constitutional implications, but accepted them "as the measure by which Congress intended to mark the scope" of the Longshoremen's Act. It simply held that the Act was adopted to provide for Federal compensation in the area which the *Jensen* line of cases placed beyond the reach of the States, and that the proviso conditioning recovery on the inapplicability of State law could not be read in a manner which would defeat the overall purpose of the Congress in adopting the law. The Court particularly stated that

> "(T)he field in which a state may not validly provide for compensation must be taken, for the purposes of the Act, as the same field which the Jensen line of decision excluded from State compensation laws."[21]

The scope of the decision therefore, is readily recognizable. The Federal act is applicable to one engaged in maritime employment. It did not hold, as the Government argues,[22] "That Section 3(a) incorporates the line drawn in the *Jensen* case between admiralty and State jurisdiction but without an exception for matters of 'local concern' ". It held only that the scope of the proviso in Section 3(a) was not sufficient to place this par-

[20] Section 2(4) of the Act, 33 U.S.C. 902(4).
[21] 314 U.S. 244, 250.
[22] Government brief, p. 49.

ticular case beyond the coverage which the Congress intended to provide.

Likewise, *O'Rourke* gives no solace to the Government. In that case there was a conflict between the application of the Safety Appliance Act and the Harbor Workers' Act. No State compensation law was involved, for there was no question but that the State Act constitutionally could not be applied to a situation where a brakeman employed by an interstate rail carrier on a car ferry was injured. The Court simply held that as between the Federal Employers' Liability Act (which incorporated the Safety Appliance Act) and the Longshoremen's Act, the latter applied because the injured employee was engaged in a maritime occupation at the time he sustained his injury.

For the foregoing reasons, we submit that it is clear that the jurisdiction assumed by the Congress was that over longshoremen and harbor workers who, under the constitutional limitations placed upon the Congress by the Court in *Jensen* and subsequent cases, could not be covered by a State compensation law; that the Louisiana State Compensation Act particularly provides for the coverage of a new construction worker within its terms; and since such coverage has been affirmed as valid and proper in the face of conflicting interests vigorously arguing the question from both sides in the formative years of the jurisprudence on this subject, there can be no doubt but that the decision of the Court of Appeals below is correct and should be affirmed.

5.

The "Twilight Zone".

We must therefore now consider whether or not the "Twilight Zone" doctrine has effected a change in the

jurisprudence. We submit this doctrine is inapplicable to the facts present in this case, and that it does not and could not change the law in the instant situation.

The twilight zone doctrine stems from the Court's decision in *Davis v. Department of Labor*, 317 U.S. 249, where, in a case involving a close question of jurisdiction as between the Washington State Compensation Act and the Harbor Workers' Act, it was said that

> "There is, in the light of the cases referred to, clearly a twilight zone in which the employees must have their rights determined case by case, and in which particular facts and circumstances are vital elements."

From the foregoing quotation, the Government argues that this case is one falling within the so-called twilight zone, an argument which was unequivocally rejected by the Court of Appeals below for the reason that this case did not fall within the area of doubt which was the basis for the decision in *Davis*.

It is our submission that *Davis* did not change the law so as to give every amphibious worker alternative remedies under the State or Federal compensation systems. State acts are to be applied exclusively in fields where no doubt exists as to their application, and a State act is clearly applicable in those cases where a State compensation law cannot apply under *Jensen*. It is only in the limited gray field that the twilight zone is applicable. The doctrine does not purport to destroy the blacks and the whites. It simply recognizes the grays. It must be remembered in considering *Davis* that the decision was rendered within the framework of the *Jensen* rule and it must be limited to its facts.

It is to be understood that the unfortunate Mr. Davis met his death during the course of dismantling a bridge over a navigable stream in the State of Washington. He was a burner and was cutting steel in order that it could be properly transported on the barge on which he was working. The character of his work may have been purely local or it may not have been, depending on whether he was to be classified as a steel worker on a bridge or as a longshoreman loading steel on a barge. The application of the State law to a welder burning steel on a bridge dismantling job obviously could not affect interstate commerce to such an extent as to become burdensome to it. The work obviously was local in its nature, and certainly was not maritime employment. On the contrary, if Davis were to be considered as one engaged in the loading or stowing of scrap steel on a barge, he should be classified as a longshoreman and would fall directly within the very words of the Federal act insofar as a claim for injuries was concerned.

It is in this framework that we submit *Davis* was decided, and it is to this particular area that it should be limited. Your Honors did not purport to say, as the Government contends, that every industrial accident occurring on the navigable waters of the United States is covered by the Federal act; on the contrary, you said that under the facts of that case, a twilight zone existed in which "the employees must have their rights determined case by case, and in which particular facts and circumstances are vital elements" (317 U.S. 249, 256). The "theoretic illogic" of having a twilight zone exist between two mutually exclusive systems disappears if the decision is so interpreted. It should be limited to those cases where the proper remedy is in doubt, where factually a claimant's rights are uncertain. As in *Motor*

Boat Sales,[23] which foreshadowed *Davis*, Your Honors deliberately refrained from tampering with the constitutional issues raised by *Jensen* and deliberately refrained from attempting to review or limit the scope of the *Jensen* rule. This obviously must be a proper view, because even if the rule were changed insofar as the constitutional aspects are concerned, the statutory interpretation could not be changed, in the face of the clear and unequivocal words of the Act, wherein coverage is limited to those cases where State law cannot afford a remedy. In addition to overturning the Constitutional doctrine, the 40-year-old rule of *Rohde* would have to be changed, and Your Honors would have to hold that a State cannot afford a remedy to a new construction worker injured during the course of his employment.

The rule of *Moores*[24] and *Baskin*[25] may be difficult to reconcile with the foregoing theory. In the former case, the Massachusetts Compensation Law was applied to a worker who was injured when he slipped on a gun mount on a vessel in a floating dry dock. In the latter case the worker sustained his injuries while in the course of repairing a vessel afloat on the navigable waters and was at first denied but on remand was granted a compensation recovery under the State law.

Since both decisions of this Court were *per curiam*, it is impossible to know exactly what reasoning dictated the outcome. If, as Mr. Justice Qua of the Supreme Judicial Court of Massachusetts suggested,

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[23] "For under the holding of that case *(Jensen)*, even in the absence of any Congressional action, federal jurisdiction is exclusive and state action forbidden in an area, which, although of shadowy limits, doubtless embraces the case before us." (314 U.S. 244, 247)

[24] *Moores'* Case, 323 Mass. 162, 80 N.E. 2d 478. Aff. 335 U.S. 874.

[25] *Baskin v. Industrial Accident Commission*, 89 Cal. App. 2d 632, 201 P. 2d 549, reversed and remanded 338 U.S. 854. Opinion on remand 97 Cal. App. 2d 257, 217 P. 2d 733, aff. 340 U.S. 886.

> "the proper course is not to attempt to reason the matter through and to reconcile previous authority or to preserve fine lines of distinction, but rather simply to recognize the futility of attempting to reason logically about 'illogic' ",

then, we submit, the race is to be swiftest and justice will be meted out on a first-come, first-served basis. Such a situation would not seem to be in the best interests of sound administrative practice, and we respectfully submit that the treatment of *Moores* and *Baskin* should be that accorded these decisions by the Court of Appeals for the Fifth Circuit in its opinion below—namely, that they were not

> "intended to make everything a twilight zone merely because the injury occurred near the waterfront to anyone who worked in, on, over or around it."[26]

Moreover, if these decisions stand for what Mr. Justice Qua apparently believes them to stand for, a longshoreman injured aboard ship could now seek compensation under a State act, even though the doctrine of *Jensen* would hold such an act unconstitutional if it purported to grant a remedy to such an employee engaged in a maritime activity. The long standing important constitutional doctrine of the *Jensen* case, we submit, should not be so lightly overruled and reversed *sub silentio*.

In this connection, the Supreme Court of Louisiana, the highest court in that State, has held in *Ellis v. Travelers Insurance Co.*,[27] that a longshoreman injured on board ship was not within the twilight zone and that his sole remedy was under the Federal act. As the Court of Appeals for the Fifth Circuit stated in *Noah v.*

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[26] Opinion below, R. 48.
[27] 241 La. 433, 129 So. 2d 729.

Liberty Mutual Ins. Co.,[28] not even *Hahn v. Ross Island Sand & Gravel Co.*,[29] went so far as to take the drastic action of overruling the *Jensen* doctrine, even though it would have been very simple to do so in that case. On the contrary, as we read that decision, this Court there interpreted the twilight zone to be limited to those cases where it is impossible to predict in advance of trial whether an injury is compensable under a State or the Federal act. It did not intend to declare the entire area open to every worker around water.[30] *Jensen* has become one of our institutions; and "Institutions, like structures, are not sound because they are old—rather they are old because they are sound."

6.

The Election of Remedies.

The difficulty involved in this area is forcibly pointed up by the decision of the Court of Appeals for the Fourth Circuit in *Newport News Shipbuilding & Dry Dock Co. v. Hearne*,[31] where the court was confronted with a situation in which the Virginia Compensation Commission had granted a compensation award. In the face of this award, the Deputy Commissioner took jurisdiction over the claim and likewise granted an award, crediting thereon the amount paid by the employer on the State compensation claim. The decision held that the Virginia Compensation Commission had no jurisdiction, and ignored the fact that an award had been made by it on an application which was first in point of time. Such actions, we submit, tend to confuse rather than to ease

[28] 267 F. 2d 218.

[29] 358 U.S. 272.

[30] Cf. *Flowers v. Travelers Insurance Co.*, 258 F. 2d 220; *Noah v. Liberty Mutual Insurance Co.*, *supra*

[31] 192 F. 2d 968.

a difficult situation, and where a rule has been fashioned to simplify recovery, it will not do to tie employers and employees in a mass of technical difficulties which will continuously embroil the courts, particularly in the delicate field of State versus Federal authority.

In this case, the claimant voluntarily accepted State compensation for over two years before going to the Deputy Commissioner. No *res judicata* arises because no judgment or award is necessary under the Louisiana Compensation system, but the claimant nevertheless effectively elected his remedy if an opportunity for election existed. On what theory may he thereafter change his election? When is he bound? If the Deputy Commissioner refuses to grant an award after hearing the merits of his claim, may a claimant disregard that action and go back to the State Court for renewed relief under the State law? Why should this type of claimant be given two bites at the cherry in this field when an election of remedies is binding in others?

All of these queries, we submit, are apposite to show the fallacy of any theory that alternative remedial action is always available. Even in the twilight zone, there must be an end to judicial and administrative proceedings, and if the claimant here ever had any justiciable claim under the Federal Act, it has been foreclosed by his two year acceptance of benefits under the Louisiana State Act.

CONCLUSION

For the reasons set forth in the able opinion of the Court of Appeals below and for the additional reasons

set forth herein, we respectfully submit that the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 532

C. D. CALBECK, DEPUTY COMMISSIONER,
BUREAU OF EMPLOYEES' COMPENSATION,
UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v.

THE TRAVELERS INSURANCE COMPANY AND
LEVINGSTON SHIPBUILDING COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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INDEX

	PAGE
Question Presented	1
Statutes Involved	2
Statement (The Travelers Insurance Case)	3
Summary of Argument	6
Argument:	
I. The Texas Workmen's Compensation Act Covers New Ship Construction and Provides That It Is the Exclusive Remedy	11
II. Section 903(a) of the Longhoremen's and Harbor Workers' Compensation Act Excludes New Ship Construction from Its Coverage	13
A. The Legal History Before the Longshoremen's and Harbor Workers' Compensation Act of 1927	14
B. The Pre-1927 Legal History Shows the Intent of Congress in §903(a) to Exclude New Ship Construction	26
C. The Legal History After the Longshoremen's and Harbor Workers' Act of 1927	27
D. The Post-1927 Decisions of This Court Place New Ship Construction Outside of the Scope of the Longshoremen's and Harbor Workers' Compensation Act	38
E. The Decisions of the Courts of Appeals Hold That New Ship Construction Is Not Within the Coverage of the Longshoremen's and Harbor Workers' Compensation Act	40
Conclusion	43

CITATIONS

Cases

Alaska Packers' Ass'n v. Industrial Accident Commission, 276 U.S. 467 21

Avondale Marine Ways v. Henderson, 346 U.S. 366, affirming 201 F. 2d 437 ..... 36, 37, 38

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BRIEF FOR THE RESPONDENTS

Respondents, The Travelers Insurance Company and Levingston Shipbuilding Company, sought to enjoin the enforcement of the Deputy Commissioner's award of compensation under the Longshoremen's and Harbor Workers' Act, and the Court of Appeals for the Fifth Circuit reversed the Trial Court's judgment, dismissing the complaint of the Respondents, the opinion being reported in 293 F. 2d 52.

QUESTION PRESENTED

Whether the Texas Workmen's Compensation Act provides the exclusive remedy for an injury sustained by a

Texas employee while performing the work of a welder upon the hull of a barge that was afloat upon navigable waters, but still under construction.

STATUTES INVOLVED

In addition to the Longshoremen's and Harbor Workers' Compensation Act, there is involved the Texas Workmen's Compensation Act, Articles 8306-8309, Vernon's Civil Statutes of the State of Texas. Pertinent parts of the Texas Act are as follows:

Article 8309, Section 1:

"'Employee' shall mean every person in the service of another under any contract of hire, expressed or implied, oral or written, except masters of or seamen on vessels engaged in interstate or foreign commerce. . . .

* * *

"'Association' shall mean the 'Texas Employers' Insurance Association' or other insurance company authorized under this Act to insure the payment of compensation to injured employees or to the beneficiaries of deceased employees.

"'Subscriber' shall mean any employer who has become a member of the association by paying the required premium; provided that the association holds a license issued by the Commissioner of Insurance, as provided for in Section 12, Part 3, of this Act."

Article 8306, Section 2:

"The provisions of this law shall not apply to actions to recover damages for personal injuries nor for death resulting from personal injuries sustained by domestic servants, farm laborers, ranch laborers, nor to employees of any firm, person or corporation having in his or their employ less than three employees, nor to the employes of any person, firm or corporation operat-

ing any steam, electric, street, or interurban railway as a common carrier. ***

Article 8306, Section 3:

"The employes of a subscriber and the parents of minor employes shall have no right of action against their employer or against any agent, servant or employe of said employer for damages for personal injuries, and the representatives and beneficiaries of deceased employes shall have no right of action against such subscribing employer or his agent, servant or employe for damages for injuries resulting in death, but such employes and their representatives and beneficiaries shall look for compensation solely to the association, as the same is hereinafter provided for. * * *"

STATEMENT

In The Travelers Insurance Company case, The Travelers Insurance Company and Levingston Shipbuilding Company filed complaint seeking to enjoin the enforcement of an Award under the Longshoremen's and Harbor Workers' Act in favor of Isabel Scott McGuyer, the widow, and Thomas Dalton McGuyer and Curtis Austin McGuyer, children of Roger D. McGuyer. The defendant, C. D. Calbeck, Deputy Commissioner, filed a motion to dismiss the action because the complaint fails to state a claim upon which relief can be granted (R. 23) and was joined in said motion by the defendants in the court below, Isabel Scott McGuyer, et al (R. 24). The complaint of The Travelers Insurance Company and Levingston Shipbuilding Company was dismissed by the Trial Court (R. 41).

The complaint for the mandatory injunction filed under authority of Article 33 U.S.C., 921, alleges that on and before July 8, 1957 Roger D. McGuyer was employed by plaintiff, Levingston Shipbuilding Company, as a welder, that said employment contract was made within the State of Texas and on July 8, 1957 the said employee, Roger D.

McGuyer, was temporarily working as a welder on the construction of a drilling barge, the hull of which was floating upon navigable waters, to-wit, the Sabine River, at which time he sustained injuries resulting in his death on July 16, 1957 (R. 2); that said drilling barge was being constructed by Levingston Shipbuilding Company and had never been used in navigation and had not been turned over to the owners and was not completed until several months after the accident (R. 3).

The complaint in the Trial Court further alleged that at the time of the accident Levingston Shipbuilding Company had more than three employees and was engaged in work covered by the Texas Workmen's Compensation Act, and that the said employee, Roger D. McGuyer, was covered by the Texas Workmen's Compensation Act, and that the said employer, Levingston Shipbuilding Company, was a subscriber under the terms of said Act, and The Travelers Insurance Company was the insurance carrier under the Texas Act (R. 3).

Further, the complaint alleged that after the death of the employee, Roger D. McGuyer, the defendant, Isabel Scott McGuyer, and the defendants, Thomas Dalton McGuyer and Curtis Austin McGuyer, filed claim for workmen's compensation with the Industrial Accident Board of the State of Texas, claiming the death benefits provided by said Act, and that thereafter the said defendants filed claim with the Deputy Commissioner under the Longshoremen's and Harbor Workers' Act (R. 3).

One formal hearing before the Deputy Commissioner, under the Longshoremen's and Harbor Workers' Act, was held Friday, June 13, 1958, which resulted in the Compensation Order dated February 18, 1959, rejecting the claim (R. 14-17). The Order of February 18, 1959, rejecting the claim was for the following reason:

> "It has not been held that the work on an uncompleted vessel comes within the provisions of the Longshoremen's and Harbor Workers' Compensation Act." (R. 16)

Thereafter, a second Compensation Order was entered July 30, 1959, modifying the original Order only to the extent of finding that the accidental injury occurred within the boundaries of Calcasieu Parish, Louisiana (R. 18-19). This second Order, in referring to the grounds for the rejection of claim contained in the original Order of February 18, 1959, said, "In the said Compensation Order the claimants' claim for compensation was rejected for the reason that it has not been held that the work on an uncompleted vessel comes within the provisions of the Longshoremen's and Harbor Workers' Act * * * " (R. 18).

Thereafter suit was filed to set aside the Deputy Commissioner's Compensation Orders of February 18, 1959 and July 30, 1959, and the defendant, C. D. Calbeck, in the court below answered by requesting the Court to remand same in order for him to make further findings and conclusions and this resulted in the Order of May 13, 1960 awarding benefits under the Longshoremen's and Harbor Workers' Act to the McGuyers (R. 10-13). This latter Order found that the employer and insurance carrier had paid $153.37 compensation benefits under the Texas Workmen's Compensation Act (R. 12).

In the formal hearing before the Deputy Commissioner in The Travelers Insurance Company case, Mr. Cecil Beeson, Personnel Manager of Levingston Shipbuilding Company stated that he is in charge of handling the claims for injuries received at his employer's place of business; had been there for fifteen years prior to the accident made the basis of the claim; had always reported injuries on new construction to the Industrial Accident Board of the State of Texas; and that they had never refused to take jurisdiction of such injuries (R. 36).

SUMMARY OF ARGUMENT

The employee in The Travelers Insurance Company case received his injury while working as a welder in the construction of a new drilling barge, the hull of which was floating upon navigable waters. There is no question but what the Texas Workmen's Compensation Act, Articles 8306-8309, Vernon's Civil Statutes covered the employer and the employee and the Travelers Insurance Company was liable under th xas Act. *The Travelers Insurance Company* v. *Gonzalez*, 351 S.W. 2d 374 (Civ. App. 1961, writ of error refused). The Texas Act provides that it is the exclusive remedy and this Court has long ago given effect to the exclusive remedy provision of the Texas Act, even to injuries occurring upon navigable waters: *Millers' Indemnity Underwriters* v. *Braud*, 270 U.S. 59 (1926).

The Longshoremen's and Harbor Workers' Act, in Section 903(a), specifically allows coverage "only * * * if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law." Until the present cases before the Court there has been no question but what new construction was compensable under the State Act[a], and an opinion of September 2, 1927 of the United States Employees' Compensation Commission specifically recognized that employees in new construction were not under the Act.[b] After over thirty years during which the employers, employees, insurance carriers, and their attorneys had considered new construction under the state acts, the question has now been raised in the instant cases that the Congressional intent in 1927 was to cover new construction.

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[a] See letter of Mr. William McCauley, Director, Bureau of Employees' Compensation, Petitioners' Brief, Appendix, p. 86.

[b] See Opinion No. 7, Petitioners' Brief, Pages 83-84.

The legal history preceding the Longshoremen's and Harbor Workers' Compensation Act of 1927 shows that the intent of Congress was to fill the gap left by *Southern Pacific Company* v. *Jensen*, 244 U.S. 205 (1917), and to provide the modern form of compensation for injuries and death involving maritime workers that could not validly be provided for by the states. *Jensen* specifically held that there was a constitutional barrier to the application of any state workmen's compensation act to an injury occurring upon navigable waters because it would work material prejudice to the characteristic features of the general maritime law.

Congress immediately passed the Act of October 6, 1917 attempting "to save to claimants the rights and remedies under the workmen's compensation law of any state", but this attempt on the part of Congress was declared unconstitutional in *Knickerbocker Ice Company* v. *Stewart*, 253 U.S. 149 (1920). Thereafter *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U.S. 469 (1922) held that new ship construction was a matter of only local concern and that the Oregon workmen's compensation law could apply. Congress apparently agreed with *Grant Smith-Porter Ship Company*, but intended to apply the decision to all cases with the Act of June 10, 1922, adding to the savings clause a provision saving to claimants other than masters or members of the crew, their rights and remedies under the workmen's compensation law of any state, and providing that said rights and remedies should be exclusive. Again this attempt by Congress was held invalid in *Washington* v. *W. C. Dawson & Co.*, 264 U.S. 219 (1924). Thereafter additional cases by this Court attempted to draw the line between *Jensen* and *Grant Smith-Porter Ship Company*, some allowing the state act to apply and some holding the state act could not apply.

Congress was thus forced into the passage of the Long-

shoremen's and Harbor Workers' Act and certainly was aware of the existing decisions of this Court, particularly that of *Grant Smith-Porter Ship Company*. Certainly the legal history shows the Congressional intent in Section 903(a) to exclude work on new construction from the coverage of the Longshoremen's and Harbor Workers' Act.

Since the passage of the Act, all of the decisions of this Court have recognized the limitation of the coverage of Section 903(a). In the early case of *Crowell* v. *Benson*, 285 U.S. 22 (1932) the Court said, "In limiting the application of the Act to cases where recovery 'through workmen's compensation proceedings may not validly be provided by state law,' the Congress evidently had in view the decisions of this Court with respect to the scope of the exclusive authority of the national legislature."[5] The Court then cited the *Grant Smith-Porter* line of cases as illustrating the intent of Congress to allow certain injuries to remain under the state law.

Parker v. *Motor Boat Sales, Inc.*, 314 U.S. 244, allowed recovery under the Longshoremen's and Harbor Workers' Act, but specifically recognized that Section 903 (a) contained a subtraction from the scope of the act and held that the subtraction was not large enough to take the case before the Court outside of the coverage. There was no pre-1927 decision holding that the employee and the accident in the *Motor Boat* case could be compensated under the state law.

Davis v. *Department of Labor*, 317 U.S. 249 reversed a state court that had refused to allow state workmen's compensation. The case involved facts that in the pre-1927 decisions had neither been held to be exclusively maritime or exclusively within the state acts, and *Davis* pointed out that in this twilight zone coverage would be allowed under the state acts, for otherwise the state act must be held

[5] 285 U.S. 39, 40.

unconstitutional. *Davis* specifically held that there was a limit to the Longshoremen's and Harbor Workers' coverage as shown by the legal history preceding the act.[4]

In the case of *Pennsylvania Railroad Co.* v. *O'Rourke*, 344 U.S. 334, the Court had to decide between the Federal Employers' Liability Act and the Longshoremen's and Harbor Workers' Act because of the exclusive remedy provisions of Section 905 of the latter act. The Court again recognized that Section 903(a) contained a limitation on the jurisdiction of the Federal Act, but before holding that the Longshoremen's and Harbor Workers' Act was applicable, specifically held that the *Jensen* line of demarcation between state and federal jurisdiction had been accepted and that "New Jersey could not have enacted statutes granting compensation for respondent's injury on navigable water, therefore respondent comes within the coverage of that portion of Section 903(a) that includes those outside the reach of state compensation laws." 344 U.S. 337

The last pronouncement by this Court is contained in *Hahn* v. *Ross Island Sand & Gravel Company*, 358 U.S. 272 (1959) and the Court again recognized the limitation contained in the coverage provisions of Section 903(a) where it is said:

> "By its terms, the Longshoremen's and Harbor Workers' Compensation Act does not apply 'if recovery

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[4] 317 U.S. 252-253:

> "* * * March 4, 1927, came the Federal Longshoremen's and Harbor Workers' Act, 33 U.S.C. §901 et seq., 33 U.S.C.A. §901 et seq. *Here again, however, Congress made clear its purpose to permit state compensation protection whenever possible* by making the federal law applicable only 'if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.'" (Emphasis ours)

for the disability or death through workmen's compensation proceedings *may* *** *validly be provided by State Law*;" 3, 44 Stat. 1426, 33 U.S.C. 903(a), 33 U.S.C.A. 903(a), (emphasis supplied) ***."

The only Court of Appeals decision involving the exact point of the instant cases before the Court is that of *United States Casualty Company* v. *Taylor*, 64 F. 2d 521, (4 Cir. 1933; certiorari denied, 290 U.S. 639). That case involved services being rendered in the completion of a new ship launched but not quite finished or placed in navigation, and the specific holding of the Court was that the same was not covered by the Longshoremen's and Harbor Workers' Act since it involved injuries and death for which workmen's compensation might validly be provided by state law and was excluded by Section 903(a), and that the limitation imposed by Section 903(a) barred the Deputy Commissioner from awarding compensation under the Longshoremen's and Harbor Workers' Act.

In summary, it is the position of Respondents that the present case before the Court, involving new construction, unquestionably falls under the Texas Workmen's Compensation Act. The remaining question as to whether it falls under the Longshoremen's and Harbor Workers' Act is clearly answered in the negative by the pre-1927 and post-1927 decisions of this Court in addition to the decision of *U. S. Casualty Co.* v. *Taylor* and the Opinion of September 2, 1927 by the United States Employees' Compensation Commission. As said by Circuit Judge Brown "*** until these two cases there was no serious contention that new construction work was covered"[2], and as said by Deputy Commissioner Calbeck in his first Compensation Order dated February 18, 1959, denying recovery in the present

[2] 293 F. 2d 54

case, "It has not been held that the work on an uncompleted vessel comes within the provisions of the Longshoremen's and Harbor Workers' Compensation Act." (R. 16)

ARGUMENT

I. The Texas Workmen's Compensation Act Covers New Ship Construction and Provides That It Is the Exclusive Remedy.

The primary obligation of the state to care for its own employees was recognized by the State of Texas in the Texas Workmen's Compensation Act of 1913 (Acts 1913, 33rd Leg., Ch. 179, p. 429, Art. 8306, et seq., Vernon's Revised Civil Statutes, 1925). The Texas Act defines "employee" within the meaning of the Act to "mean every person in the service of another under any contract of hire, express or implied, oral or written, except masters of or seamen on vessels engaged in interstate or foreign commerce, * * *" Art. 8309, §1.[1]

The only employees or employers excluded by the Act are "domestic servants, farm laborers, ranch laborers, * * * employees of any firm, person or corporation having in his or their employ less than three employees, * * * employees of any person, firm or corporation operating any steam, electric, street or interburban railway as a common carrier", Art. 8306, §2.[2]

In the present *Travelers Insurance Company* case, Roger D. McGuyer was working for Levingston Shipbuilding Company as a welder in the construction of a new drilling barge, the hull of which was floating upon navigable waters, to-wit, the Sabine River. McGuyer was an employee within the meaning of Art. 8309, §1. The Travelers Insurance

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[1] This brief, supra, p. 2.

[2] This brief, supra, p. 2.

Company was the association[3] and Levingston Shipbuilding Company was a subscriber.[4]

The decisions of the Texas courts, both before and after the Longshoremen's and Harbor Workers' Act have held that injuries such as those received by the employee, Roger D. McGuyer, in the instant case, occurring upon navigable waters were covered by the Texas Workmen's Compensation Act. *Emmons* v. *Pacific Indemnity Company*, 208 S.W. 2d 884 (Tex. S. Ct. 1948); *Millers' Indemnity Underwriters* v. *Boudreaux*, 261 S.W. 137, Tex. Comm. App. 1924, aff'd., 46 S. Ct. 194, 270 U.S. 59 (1926); *Brown* v. *Aetna Casualty & Surety Company*, 145 S.W. 2d 171 (Tex. Comm. App. 1940, opinion adopted by S. Ct.); *Travelers Insurance Co.* v. *Gonzalez*, 351 S.W. 2d 374 (Civ. App. 1961, writ of error refused, n.r.e.); and *Indemnity Insurance Company of North America* v. *Marshall*, 308 S.W. 2d 174 (Beaumont Civ. App. 1957, w. o. ref., n.r.e.). The case of *Travelers Insurance Co.* v. *Gonzalez* involved an injury while the employee was working as a painter and sandblaster on a new and incompleted drilling barge floating in the Sabine River.

The Texas Act provides that "such employees and their representatives and beneficiaries shall look for compensation solely to the association, as the same is herein provided for."[5]

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[3] "'Association' shall mean the 'Texas Employers' Insurance Association' or other insurance company authorized under this Act to insure the payment of compensation to injured employees or to the beneficiaries of deceased employees." Article 8309, Section 1, this brief, page 2.

[4] "'Subscriber' shall mean any employer who has become a member of the association by paying the required premium; provided that the association holds a license issued by the Commissioner of Insurance, as provided for in Section 12, Part 3, of this Act." Article 8309, Section 1, this brief, page 2.

[5] Article 8306, Section 3, this brief, supra, page 3.

The exclusive remedy feature of the Texas Workmen's Compensation Act as set forth in Article 8306, §3 of that Act was held to be effective and to prescribe the only remedy for an injury occurring upon the Sabine River in *Millers' Indemnity Underwriters* v. *Braud*, 270 U.S. 59 (1926). In that case this Court said with reference to the Texas Act:

> "* * * The Act prescribes the only remedy; its exclusive features abrogate the right to resort to the admiralty court which otherwise would exist." 270 U.S. 65

The claimants in the instant case recognize the applicability of the Texas Workmen's Compensation Act and the exclusive feature provisions of said act and thus have filed a claim under the Texas Act with the Industrial Accident Board of the State of Texas where the same is now pending (R. 3).

II. Section 903(a) of the Longshoremen's and Harbor Workers' Compensation Act Excludes New Ship Construction from Its Coverage.

The Longshoremen's and Harbor Workers' Compensation Act contains a specific limitation on its coverage in Section 903(a) where coverage is provided as follows:

> "Compensation shall be payable under this Chapter in respect of disability or death of an employee, *but only* if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and *if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State Law.* * * * "[6] (emphasis ours)

It is the position of Respondents that the above limitation

[6] 33 U.S.C.A §903(a)

to coverage to cases where "recovery for the disability or death through workmen's compensation proceedings may not validly be compensated by state law" excludes new ship construction because at the time of the passage of the Longshoremen's and Harbor Workers' Act in 1927, Congress was fully aware of the decision of this Court allowing state acts to apply to new ship construction. *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U.S. 469 (1920). The legal history preceding the passage of the Longshoremen's and Harbor Workers' Act clearly shows this Congressional intent.

It is the further position of Respondents that the decisions of this Court since 1927 have construed the intent of Congress to exclude new construction as in *Grant Smith-Porter Ship Co.* from the coverage of the Longshoremen's and Harbor Workers' Act. The pre-1927 legal history and the post-1927 decisions of this Court leave no other construction of Section 903(a) possible.

A. The Legal History Before the Longshoremen's and Harbor Workers' Compensation Act of 1927

The pertinent history begins with the "ill-starred decision"[7] of *Southern Pacific Company* v. *Jensen*, 244 U.S. 205 (1917). In that case death benefits under the New York workmen's compensation law had been awarded by the New York Court where the employee was killed while unloading a vessel afloat on navigable waters. This Court, in a five to four decision, reversed the State Court judgment holding that to apply the New York law to an accident occurring on navigable waters while unloading a vessel would be invalid as it conflicts with the Constitution. The majority opinion pointed out that Article III, Section 2 of the Constitution ex-

[7] Concurring opinion of Mr. Justice Frankfurter in *Davis* v. *Department of Labor*, 317 U.S. 255, 259.

tends the judicial power of the United States to all cases of admiralty and maritime jurisdiction, and Article I, Section 8, confers upon Congress the power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and that by Section 9 of the Judicial Act of 1789 the District Courts of the United States were given exclusive original cognizance of all civil cases of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it. The Court then held that state legislation contravening the essential purpose expressed by an Act of Congress or working material prejudice to the characteristic features of the general maritime law or interfering with the proper harmony and uniformity of that law in its international and interstate relations would not be valid and that the work of a stevedore was maritime in its nature, his employment was a maritime contract, and the injuries received were maritime, and thus, to apply the New York workmen's compensation law to compensate for these maritime injuries would conflict with the Constitution and be invalid.

After the *Jensen* case the Act of October 6, 1917 added to the savings clause "so as to save to claimants the rights and remedies under the workmen's compensation law of any state." In *Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149 (1920), another five to four decision, this Court reversed an award of death benefits under the New York workmen's compensation act. The majority opinion held that the power of Congress to legislate concerning the rights and liabilities within the maritime jurisdiction and remedies for their enforcement arises from the Constitution, and while Congress could pass its own workmen's compensation act for maritime injuries, it could not delegate to the state as this would defeat the purpose and destroy the harmony and uniformity which the Constitution established in the maritime

field. The opinion pointed out that in *The Hamilton*, 207 U. S. 398, in an admiralty proceeding, effect was given as against a ship registered in Delaware to a statute of that state which permitted recovery by an ordinary action for fatal injuries, and that in that case the power of a state to supplement the maritime law to that extent was recognized, but the Court refused to extend the doctrine of *The Hamilton*.

After the *Knickerbocker* case, in *The Francis McDonald*, 254 U. S. 242 (1920) this Court held that a libel in admiralty could not be maintained for a debt under a contract to furnish materials, work and labor for the completion of a vessel that had been launched. The unanimous opinion by Mr. Justice McReynolds said:

> "Notwithstanding possible and once not inappropriate criticism, the doctrine is now firmly established that *contracts to construct entirely new ships are nonmaritime* because not nearly enough related to any rights and duties pertaining to commerce and navigation. It is said that in no proper sense can they be regarded as directly and immediately connected with navigation or commerce by water. * * * *And we think the same reasons which exclude such contracts from admiralty jurisdiction likewise apply to agreements made after the hull is in the water*, for the work and material necessary to consummate a partial construction and bring the vessel into condition to function as intended." 254 U. S. 244-245. (Emphasis ours.)

Prior to *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U. S. 469 (1922), this Court decided the case of *Western Fuel Co.* v. *Garcia*, 257 U. S. 233 (1921). The *Western Fuel Company* case involved a libel in admiralty for the death of an employee killed upon navigable waters while employed as a stevedore. The action was based upon negligence and it was contended that effect should be given to the California

statute requiring a negligence action to be brought within one year. This Court in a unanimous decision delivered by Mr. Justice McReynolds reversed the District Court decision, awarding substantial damages, with instructions to dismiss the libel, holding that the District Court should have applied the limitation period of the California law.

The case of *Grant Smith-Porter Ship Company* v. *Rohde*, 257 U.S. 469 involved a libel in admiralty for injuries to an employee which were received while he was working as a carpenter on a partially completed vessel lying upon a navigable stream. The vessel had been launched but had not been completed, although it had been substantially completed at the time of the injury. The employee at the time of the injury was at work constructing a bulkhead enclosing certain tanks in the vessel. The action was based upon negligence and the defense was that the Oregon workmen's compensation law barred recovery. The Circuit Court of Appeals certified questions to this Court as follows:

> "(1) Is there jurisdiction in admiralty because the alleged tort occurred on navigable waters?
>
> "(2) Is libellant entitled because of his injury to proceed in admiralty against respondent for the damages suffered?"
>
> 257 U.S. 475.

This Court, without dissent, in an opinion by Mr. Justice McReynolds held that construing the first question as to inquire whether general admiralty jurisdiction extends to recover damages resulting from a tort committed on a vessel in the process of construction when lying on navigable waters, the answer is "yes", and further, assuming that the second question presents the inquiry as to whether "the exclusive features of the Oregon Workmen's Compensation Act would apply and abrogate the right to re-

cover damages in an admiralty court, which would otherwise exist,'" the answer is "Yes". The opinion of this Court specifically held that the contract for constructing the vessel was non-maritime and neither the libellant's general employment nor his activities at the time had any direct relation to navigation or commerce, citing *The Francis McDonald*, 254 U.S. 242. The Court distinguished *Jensen* and recognized and applied the local concern doctrine of *Western Fuel Co.*, stating:

> "In Western Fuel Co. v. Garcia we recently pointed out that as to certain local matters regulation of which would work no material prejudice to the general maritime law, the rules of the latter might be modified or supplemented by state statutes. The present case is controlled by that principle. The statute of the state applies and defines the rights and liabilities of the parties. The employee may assert his claim against the Industrial Accident Fund to which both he and the employer have contributed as provided by the statute, but he cannot recover damages in an admiralty court." (257, U.S. 477)

After the decision in *Grant Smith-Porter Ship Co.* v. *Rohde*, there were several cases decided by this Court prior to the passage of the Longshoremen's and Harbor Workers' Act, some of which followed *Jensen* in holding the state act inapplicable as working material prejudice to the characteristic features of the general maritime law and others which followed *Grant Smith-Porter Ship Company* v. *Rohde* and *Western Fuel Company* v. *Garcia*, recognizing that the state could supplement the general maritime law under the "local concern" doctrine.

In *State Industrial Commission* v. *Nordenholt Corporation*, 259 U.S. 263 (1922), a New York court had reversed

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*257 U.S. 478

an award of workmen's compensation for death benefits under the New York act. The employee died from accidental injuries received while working as a longshoreman unloading a vessel lying on navigable waters, but at the time of his injury he was working on the dock. This Court reversed the New York court, holding that the injury occurring on the dock was an injury occurring upon an extension of land and that the application of the New York workmen's compensation act would not conflict with any superior maritime law, citing and quoting from *Grant Smith-Porter Ship Co. v. Rohde*.

Great Lakes Dredge & Dock Co. v. Kierejewski, 261 U.S. 479 (1923) involved a libel in admiralty brought for the death of an employee against his employer based on negligence. The employer was engaged in dredging, piledriving, etc. and had a yard at Buffalo, New York. The employee was a boilermaker, employed to perform services as called upon. At the time of the accident, he was making repairs on a scow moored in the navigable waters of the Buffalo River, and was on a scaffold resting upon a float alongside the vessel. This Court held that admiralty had jurisdiction because the employee was performing a maritime service to a complete vessel afloat on navigable waters. It distinguished *Grant Smith-Porter Ship Company* on the grounds that the latter did not involve general employment or activities that had any direct relation to navigation or commerce.

In *Washington v. W. C. Dawson & Co.*, 264 U.S. 219 (1924), the Court "overruled" the second expression of Congressional intent to make applicable the state workmen's compensation laws. Congress had passed the Act of June 10, 1922[9] amending the Judicial Code so as to save

[9] 42 Stat. 634

"to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel their rights and remedies under the Workmen's Compensation Law of any state, district, territory, or possession of the United States, which rights and remedies when conferred by such law shall be exclusive." This Court, in an opinion by Mr. Justice McReynolds, reluctantly agreed to by Mr. Justice Holmes, and with Mr. Justice Brandeis writing a dissenting opinion, held the attempted amendment was beyond the power of Congress in that the exception of master and crew was insufficient to meet the objections pointed out in *Knickerbocker Ice Company* v. *Stewart*, 253 U.S. 149.

Robins Dry Dock & Repair Co. v. *Dahl*, 266 U.S. 449 (1925) involved a case where the plaintiff had recovered a judgment in a New York state court for damages for personal injuries on the basis of negligence of his employer. At the time of his injury he was working on a vessel lying in navigable waters and working on a scaffold. The Trial Court instructed the jury on a New York statute requiring an employer to furnish a safe scaffold. The opinion of this Court held that the instruction to the jury to consider the provisions of the local law in deciding whether or not the employer was negligent would not have been permissible in an admiralty court and it was no less objectionable when given in a state court because the tort was maritime, suffered by one doing repair work on board a completed vessel and the matter was, therefore, not of mere local concern as in *Grant Smith-Porter Ship Company*, but had direct relation to navigation and commerce, as in *Great Lakes Dredge & Dock Co.* v. *Kierejewski*.

Great Lakes Dredge & Dock Co. v. *Kierejewski*, was followed again in *Gonsalves* v. *Morse Dry Dock & Repair Co.*, 266 U.S. 171 (1924). This case involved a libel action

brought against the employer. The employee, at the time of the injury, was engaged in the repair of a vessel in a dry dock. This Court held that the libel action should not have been dismissed since repairs to a vessel while in an ordinary dry dock were not made on land, citing *The R. W. Parsons*, 191 U.S. 17, and *The Jefferson*, 215 U.S. 130.

In 1926 this Court in an unanimous decision affirmed an award of workmen's compensation under the Texas workmen's compensation act for the death of an employee occurring upon the navigable waters of the Sabine River, *Millers' Indemnity Underwriters* v. *Braud*, 270 U.S. 59 (1926). In this case, the employee had submerged himself from a floating barge anchored in the navigable Sabine River thirty-five feet from the bank for the purpose of sawing off the timbers of an abandoned set of ways once used for launching ships and which had become an obstruction to navigation. While thus submerged the air supply failed and he died of suffocation. The Supreme Court of Texas awarded workmen's compensation under the Texas law, 261 S.W. 137. It was contended before this Court that the claim arose out of a maritime tort and that the rights and obligations of the parties were fixed by the maritime law and that the State had no power to change these by statute or otherwise. In a unanimous decision delivered by Mr. Justice McReynolds, this Court cited and quoted from *Grant Smith-Porter Ship Co.* v. *Rohde* to the effect that the State law would govern where "regulation of rights, obligations and consequent liabilities of the parties as between themselves by local rule would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations", 270 U.S. 64. The opinion specifically recognized that the facts were sufficient to show a maritime tort and admiralty jurisdiction would

extend to same except for the exclusive features of the Texas workmen's compensation act. The Court stated:

> "In the cause now under consideration the record discloses facts sufficient to show a maritime tort to which the general admiralty jurisdiction would extend save for the provisions of the state Compensation Act; but the matter is of mere local concern and its regulation by the state will work no material prejudice to any characteristic feature of the general maritime law. *The act prescribes the only remedy; its exclusive features abrogate the right to resort to the admiralty court which otherwise would exist.*" (270 U.S. 64-65) (emphasis ours)

Alaska Packers Ass'n v. *Industrial Accident Commission of California*, 276 U.S. 467 (1928) involved a claim to recover workmen's compensation benefits under the California workmen's compensation law, and an award of workmen's compensation was affirmed by this Court. The employee was employed by his employer to go to Alaska as a seaman on a vessel to work as a fisherman, make nets, fix small boats, work in the cannery, and do anything else he was told to do. At the time of his injury, he was attempting to push a small 26 foot boat into the water. This Court held that there probably was some question as to whether this was within admiralty jurisdiction, but even if it were within admiralty jurisdiction, it fell within the "local concern" doctrine, in that at the time of his injury he was not engaged in any work so directly connected with navigation and commerce that to permit the rights of the parties to be controlled by the local law would interfere with the essential uniformity of the general maritime law, citing *Grant Smith-Porter Ship Co.* v. *Rohde* and *Millers' Indemnity Underwriters* v. *Braud*.

The logging and timber industry was held to be an industry of local concern in *Sultan Railway & Timber Company* v. *Dept. of Labor and Industries*, 277 U.S. 135 (1928).

This case involved two suits to restrain the enforcement of orders requiring the employers to pay into the State Workmen's Compensation Fund of the State of Washington, and their dismissal was affirmed by this Court. In one case, the employer was engaged in logging operations, and the employees involved were those that would put logs into booms after they had been thrown into a navigable river so that they could be towed elsewhere. The other employer was engaged in sawmill work and the employees involved would take the booms apart and guide the logs up a conveyor into the mill. This Court held that these occupations were governed by the local law and not the maritime law on the basis of *Great Smith-Porter Ship Co., Millers' Indemnity Corporation* and *Alaska Packers Ass'n* cases.

An award of state workmen's compensation by the Supreme Court of the State of Wisconsin was reversed by this Court in a stevedore's case in *Northern Coal & Dock Company v. Strand*, 278 U.S. 142 (1928). The basis of that decision was that the employee, at the time of his injury, was doing longshore or stevedore work aboard a vessel lying on navigable waters, and that such an undertaking was not a matter of purely local concern, but had direct relation to commerce and navigation, and thus, the State Act could not apply, as in *Great Smith-Porter Ship Company* or *Millers' Indemnity Underwriters*.

Again in 1929 the State Supreme Court decision awarding death benefits under the state workmen's compensation law was reversed in *London Guarantee & Accident Company v. Industrial Accident Commission of California*, 279 U.S. 109 (1929). The employee in this case was engaged as a navigator for a pleasure deep sea fishing company. At the time of his death, he and two other employees were on an 18 foot vessel in a storm attempting to recover one of the fishing boats that had broken from its mooring. This Court, after reviewing all of the cases since *Southern Pacific Co. v. Jen-*

seaman, held that he was a seaman in the course of his employment and the vessel he was engaged to navigate was registered and had all the features of maritime employment, and that, therefore, the state Compensation Act could not apply because it would be prejudicial to the characteristic features of the general maritime law.

John Baizley Iron Works v. *Spun*, 281 U.S. 222 (1930) and *Employers' Liability Assurance Corporation, Ltd.* v. *Cook*, 281 U.S. 233 (1930) were two other cases decided after passage of the Longshoremen's and Harbor Workers' Act, but each involved an injury that occurred prior to the passage of that Act. In the *John Baizley Iron Works* case the employee had recovered workmen's compensation under the Pennsylvania Act for an injury received in 1926 when he was engaged in performing repairs on a vessel floating upon navigable waters. This Court reversed the award of state workmen's compensation and held that repairing a completed ship lying in navigable waters has direct and intimate connection with navigation and commerce and was not the same as in *Grant Smith-Porter Ship Co.* v. *Rohde*, but fell under the cases of *Great Lakes Dredge & Dock Co.* v. *Kierejewski*, *Gonsalves* v. *Morse Dry Dock & Repair Co.* and *Robins Dry Dock & Repair Co.* v. *Dahl*. It is to be noted that Mr. Justice Stone wrote a dissenting opinion, joined by Mr. Justice Holmes and Mr. Justice Brandeis on the basis that the award of state compensation should be affirmed on the authority of *Rosengrant* v. *Harvard*, 273 U.S. 664, which affirmed, without opinion, but on the authority of *Grant Smith-Porter Ship Co.* v. *Rohde* and *Millers' Indemnity Co.* v. *Braud*, the judgment of the Alabama Supreme Court allowing workmen's compensation for an injury to an employee who was working as a lumber inspector for a

lumber manufacturer and was on board a schooner lying in navigable waters temporarily for the purpose of checking a cargo of lumber that was then being discharged from a barge nearby.

Again in *Employers' Liability Assurance Corporation, Ltd., v. Cook*, 281 U.S. 233, an award of Texas workmen's compensation was reversed by this Court in an opinion by Mr. Justice McReynolds. The employee was employed by Ford Motor Company to do any kind of work and as a part of his contract he was on board a vessel lying on navigable waters, unloading cargo at the time of his injury. It is to be noted that again Mr. Justice Stone wrote a dissenting opinion, concurred in by Mr. Justice Holmes and Mr. Justice Brandeis, stating that the State Act could not apply where the employee was a seaman within the meaning of the Jones Act and thus in a field that Congress had occupied, but stating that the facts of the case were not so exclusively controlled by the maritime law that workmen otherwise in the situation of the claimant who were not seamen and, therefore, not given the remedy of the Jones Act could be excluded from the benefits of a compensation act like that of Texas. It is of particular interest to note what the dissenting opinion said with reference to the Longshoremen's and Harbor Workers' Act:

> "The present case arose before the effective date of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 424 (33 U.S.C.A. §§901-950). But the remedies given by that Act are withheld where recovery may be had under local compensation acts and not all persons engaged in unloading a vessel are entitled to recover under it, even though without remedy under local compensation laws. See §3(a), 33 U.S.C.A. §903(a)." (280 U.S. 237-238)

B. The Pre-1927 Legal History Shows the Intent of Congress in §903(a) to Exclude New Ship Construction

From the foregoing legal history, it is obvious that the purpose of the Longshoremen's and Harbor Workers' Act of 1927 was to fill the gap left by the *Jensen* line of decisions and to provide the modern form of compensation for injuries and death involving maritime workers that this Court had held could not validly be provided for by the several States. It is likewise clear that at the time of the passage of the Longshoremen's and Harbor Workers' Act, Congress was fully aware of at least the then line of demarcation as set forth by the *Grant Smith-Porter Ship Company* line of decisions, and fully aware of this Court's decision that the exclusive features of the Texas Workmen's Compensation Act abrogated other causes of action where the Act could be constitutionally applied as held in *Millers' Indemnity Co.* v. *Braud*, 270 U.S. 59. With these precise decisions before them, it must follow that the intent of Congress in limiting the coverage of the Longshoremen's and Harbor Workers' Act in Section 903 (a) was to exclude new ship construction from the coverage.

The foregoing history also shows that immediately after the decision in the *Jensen* case, Congress passed the Act of October 6, 1917, adding to the savings clause "so as to save to claimants the rights and remedies under the workmen's compensation law of any state". This was struck down in the five to four decision of *Knickerbocker Ice Company* v. *Stewart*, 253 U.S. 149. The legal history further shows the intent of Congress in the Act of June 10, 1922 to leave to the states the compensating of persons other than masters or members of the crew and that the state acts should be exclusive remedy. The Act of June 10, 1922 was struck down by *State of Washington* v. *W. C. Dawson & Co.*, 264 U.S. 219 (1924).

The intent of Congress to allow the State Workmen's compensation law to apply to longshoremen and harbor workers and for the same to be the exclusive remedy is clearly evidenced by the Act of October 6, 1917 and the Act of June 10, 1922. It is further noted that the lead cases against the application of the state compensation law to such workers were five to four decisions, *Southern Pacific Company* v. *Jensen*, and *Knickerbocker Ice Co.* v. *Stewart*, while the decisions of this Court in favor of the application of the state workmen's compensation law were unanimous decisions, *Grant Smith-Porter Ship Co.* v. *Rohde*, *Millers' Indemnity Underwriters* v. *Brand*.

Respondents respectfully urge that this pre-1927 legal history clearly indicates the intention of Congress at the time of the passage of the Longshoremen's and Harbor Workers' Act to leave everything constitutionally possible to the state workmen's compensation laws rather than as contended by Petitioner to make the Federal law applicable in every case that Congress had the power to do so.

C. The Legal History After the Longshoremen's and Harbor Workers' Act of 1927.

Since the passage of the Longshoremen's and Harbor Workers' Act in 1927, and up to some time shortly before the third award in *The Travelers Insurance Company* case, it had never been considered that injuries on new construction were within the Longshoremen's and Harbor Workers' Act (see letter of Mr. William McCauley, Director of Bureau of Employees' Compensation, Petitioner's Brief, appendix, page 86). Shortly after the effective date of the Act, the United States Employees' Compensation Commission (predecessor to the present [illegible] Bureau of Employees' Compensation [illegible]) having the duty to enforce the Act, issued Opinion No. 7 dated September 2, 1927. That opinion expressly cited *The Francis McDonald*,

254 U.S. 242, *Robins Dry Dock & Repair Co.* v. *Dahl*, 266 U.S. 449, and *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U.S. 469, and concluded as follows:

> "The United States Employees' Compensation Commission therefore will take no action under the longshoremen's act against an employer engaged only in the construction of vessels who does not comply with the act, nor against any employer engaged in the construction and repair of vessels who secures payment of compensation to employees while employed on repair work on a vessel in a dry dock or on marine ways."[10]

That it was the intent of Congress to allow the state laws to apply under the decisions prior to the Act is clear from the preceding discussion of the pre-1927 legal history. In addition, however, we can look to the decisions of this Court after the passage of the Longshoremen's and Harbor Workers' Act to confirm that Congress did so intend when placing the limitation of coverage in Section 905(a).

In *Employers' Liability Assurance Corporation, Ltd.* v. *Cook*, 281 U.S. 233, State compensation was not allowed by this Court to an injury occurring on navigable waters while engaged in unloading a vessel. The injury occurred before the effective date of the Longshoremen's Act, but the intention of Congress in the limitation provisions of Section 903(a) were commented upon in the dissenting opinion by Mr. Justice Stone, wherein it is said, "but the remedies given by the Act are withheld where recovery may be had under local compensation acts * * *. See Section 3(a), 33 U.S.C.A. §903(a)." 281 U.S. 237, 238.

In *Noqueira* v. *New York, N. H. & H. R. Co.*, 281 U.S. 128 (1930), the Court had before it the question as to

[10] U.S. Employees' Compensation Commission Opinion No. 7, September 2, 1927, Petitioners' Brief, Appendix, p. 84.

whether the Federal Employers' Liability Act, 45 U.S.C.A., §§51-59, or the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927 was applicable to injuries to a railroad employee received while upon navigable waters. In an unanimous opinion delivered by Mr. Chief Justice Hughes, this Court held that since the employee was engaged in loading a carfloat on navigable waters, his injury was within the terms and provisions of the Longshoremen's and Harbor Workers' Act, and since it fell under Section 903(a), that the exclusive provisions of Section 905 excluded the application of the Federal Employers' Liability Act. The opinion discusses the history of the act and specifically recognizes the limitation provision of Section 903(a) when the Court said, "The application of the Act in such cases was explicitly made to depend upon the question whether the injury occurred upon navigable waters and recovery therefor could not validly be provided by a state compensation statute."[11]

The next comment upon the intention of Congress in placing the limitation provision on Section 903(a) is found in *Crowell* v. *Benson*, 285 U.S. 22 (1932). In that case the Court had before it the question of the extent of judicial review from a finding by the Deputy Commissioner, but in reviewing the history of the Act and its jurisdictional limitations, the Court specifically recognized the exclusion by Congress of cases where the states might validly provide compensation. In the opinion it was said, "In limiting the application of the Act to cases where recovery 'through

[11] 281 U.S. 128 at p. 136. See also p. 131 where the Court said:

"The general scheme of the Longshoremen's and Harbor Workers' Compensation Act was to provide compensation to employees engaged in maritime employment, except as stated, for disability or death resulting from injury occurring upon the navigable waters of the United States where recovery through workmen's compensation proceedings might not validly be provided by state law. * * *"

workmen's compensation proceedings may not validly be provided by state law," the Congress evidently had in view the decisions of this Court with respect to the scope of the exclusive authority of the national legislature." 285 U.S. 39-40. The citations following the above quotation from the Opinion were to the *Jensen* line of cases and the *Grant Smith-Porter Ship Company* line of cases.

The next opinion of this Court commenting upon the limitation provision contained in Section 903(a) was in 1941 in *Parker* v. *Motor Boat Sales, Inc.*, 314 U.S. 244. That case involved an action by the employer to enjoin an award made under the Longshoremen's and Harbor Workers' Act. The employer was engaged in selling small boats, maritime supplies, and outboard motors. At the time of the accident made the basis of the claim, the employee was on a boat trip to test one of the outboard motors. While there was some question as to whether he was authorized to go on the boat, it was shown that he was instructed to go with a superior fellow-employee to help place the outboard motor on the boat, and that at this time he had no specific instructions to stay out of the boat and that his superior fellow-employee acquiesced in his remaining on the boat to keep a lookout for hidden objects. The Circuit Court had held that the Longshoremen's and Harbor Workers' Act did not apply because the employee's work was so local in character that the State of Virginia could validly have provided workmen's compensation. The holding was primarily based on the fact that the employee was hired as a janitor and porter and was predominantly a non-maritime employee. This Court, however, held that habitual performance of other and different duties on land would have no effect on the maritime activity at the time of the accident because Section 902, subdivision 4 expressly provided for

the Act's application to "employees (who) are employed * * * in whole or in part upon the navigable waters of the United States." However, the opinion expressly recognized that if the Circuit Court's opinion was to be sustained, it would be on the basis that this particular case fell within the area of the limitation set out in Section 903(a) as being a case where recovery may validly be provided by state law. After referring to *Jensen*, *Knickerbocker* and *Washington* v. *Dawson*, the opinion pointed out that the problem did not involve the constitutional principles announced in those cases since there was no question but that Congress could constitutionally have provided compensation, but that the question was "whether Congress has so provided in this statute."[12] The opinion expressly recognized that Section 903(a) was a subtraction from the scope of the Act, but held that "it is not a large enough subtraction to place this case outside the coverage which Congress intended to provide".[13] The decision in the *Parker* case again recognized all prior interpretations of the Longshoremen's and Harbor Workers' Act which was that the purpose of the Act was to provide for Federal compensation in the area where specific decisions previously had held the state Acts could not apply[14] and recognized that the limitation provision of Section 903(a) was to be interpreted in the light of the pre-1927 decisions without regard to whether the constitutional

[12] 314 U.S. 248

[13] 314 U.S. 249

[14] "There can be no doubt that the purpose of the Act was to provide for federal compensation in the area which the specific decisions referred to placed beyond the reach of the states." 314 U.S. 249.

principles announced in those cases were affirmed or rejected.[15]

It is to be noted that in *Parker* v. *Motor Boat*, the employee's activities at the time of the accident were not such as could be classified under any specific pre-1927 holding as of local concern; in other words, there was no pre-1927 decision of this Court holding under such facts that the states could validly provide workmen's compensation. On the other hand, there was no specific fact situation in the pre-1927 decisions that would clearly make the employee in the case fall under the *Jensen* line of decisions. It could thus be said that *Parker* v. *Motor Boat* created a twilight zone for the application of the Longshoremen's and Harbor Workers' Act in cases where there was no pre-1927 decision which Congress could have intended to exclude at the time of the passage of the Act which contained the limitation of Section 903(a).

While *Parker* v. *Motor Boat* may be considered an application of the "twilight zone" where there are no pre-1927 precedents, the first reference and actual holding of a "twilight zone" was in applying state coverage in *Davis* v. *Department of Labor*, 317 U.S. 249 (1942). In that case the Supreme Court of Washington had held that the state workmen's compensation act could not provide benefits consistently with the Federal Constitution. This Court reversed

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[15] "The main impetus for the Longshoremen's and Harbor Workers' Compensation Act was the need to correct a gap made plain by decisions of this Court. We believe that there is only one interpretation of the proviso in Section 3(a) which would accord with the aim of Congress; the field in which a state may not validly provide for compensation must be taken, for the purposes of the Act, as the same field which the Jensen line of decision excluded from state compensation laws. Without affirming or rejecting the constitutional implications of those cases, we accept them as the measure by which Congress intended to mark the scope of the Act they brought into existence." 314 U.S. 250.

that decision. The employee was a structural steel worker and was drowned in a navigable stream while his employer was performing a job to dismantle an abandoned drawbridge which spanned the river. The steel was cut from the bridge and lowered from a barge by derrick and when loaded, the barge was to be towed by tug to a storage point about two hundred and fifty feet away. Three vessels had been brought to the job site, a tug, derrick barge, and a barge, all licensed vessels. The deceased had helped to cut some of the steel from the bridge and at the time of the accident was working on the barge which had not yet been completely loaded. His duty appeared to have been to examine the steel after it was lowered to the barge and when necessary, to cut the pieces to proper lengths. He fell, or was knocked into the stream and was drowned. It was clear from the terms of the Washington compensation statutes that the deceased was specifically covered. In the opinion of the Court, delivered by Mr. Justice Black, the effect of the *Jenson* line of decisions was recognized to interfere with the application of the state compensation laws to all maritime employees, but under some circumstances to allow the state laws to apply to maritime employees. In interpreting Section 903(a), the opinion again reviewed the pertinent history. It was pointed out that after the *Jenson* decision refused to allow state laws to apply, Congress passed the Act of October 6, 1917,[16] attempting to give to injured maritime employees the rights and remedies under state workmen's compensation laws, but that this Act was held unconstitutional by *Knickerbocker Ice Co.* The opinion then pointed out the attempt of Congress after the *Knickerbocker* case to allow the state acts to apply and to be an exclusive remedy in the Act of June 10, 1922,[17] but the latter Act was

[16] 40 Stat. 395
[17] 42 Stat. 634

held invalid by *State of Washington* v. *W. C. Dawson & Co.* The opinion then followed:

> "* * * March 4, 1927, came the Federal Longshoremen's and Harbor Workers' Act, 33 U.S.C. §901 et seq., 33 U.S.C.A. §901 et seq. *Here again, however, Congress made clear its purpose to permit state compensation protection whenever possible* by making the federal law applicable only 'if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.'" (317 U.S. 252-253; emphasis ours)

After recognizing the intent of Congress to cover maritime workers only if the state laws could not be validly applied, this Court held that "employees such as decedent here occupy that shadowy area within which at some undefined and undefinable point state laws can validly provide compensation",[18] and recognizing that the Court had "been unable to give any guiding, definite rule to determine the extent of state power,"[19] the Court held that in such marginal cases or twilight zone cases, without overruling *Jensen*, it should be held "that the Constitution is no obstacle to the petitioner's recovery."[20] Mr. Justice Frankfurter and Mr. Chief Justice Stone, in concurring opinions, apparently did not favor the implications of recover under both the federal and the state act.

Following *Davis* came the per curiam decisions of this Court permitting state workmen's compensation to apply to repair work on navigable waters. *Bethlehem Steel Company* v. *Moores*, 335 U.S. 874, affirming 323 Mass. 162, 80 N.E. 2d 478; and *Baskin* v. *Industrial Accident Commission*, 338 U.S. 854, vacating the judgment in 89 Cal. App. 2d 632, 201 P. 2d 549. In *Moores* case this Court affirmed the state court's judgment awarding compensation under the Mas-

[18] 317 U.S. 253
[19] 317 U.S. 253
[20] 317 U.S. 258

sachusetts act, citing *Davis*. In *Baskin*, this Court reversed the State court's denial of state compensation to allow the California court to reconsider its interpretation of *Davis* in light of the affirmance of *Moores* case. These two cases are a clear recognition of the applicability of the state workmen's compensation in light of the twilight zone theory and the presumptions in favor of the constitutionality of the state statutes as stated in *Davis*.

The next decision by this Court interpreting the Longshoremen's and Harbor Workers' Act did not have the problem of state versus federal conflict. This was the decision in *Pennsylvania Railroad Company* v. *O'Rourke*, 344 U.S. 334 (1953). In that case the railroad employee had sought recovery under the Federal Employers' Liability Act and the defense was that the Longshoremen's and Harbor Workers' Act provided an exclusive remedy by the terms of Section 905. The employee's work in that case was that of a railroad brakeman, but at the time of the injury made the basis of his suit he had to climb aboard car floats on navigable waters to release the hand-brakes so that the cars could be pulled off of the float by the engine. In this case the Court again specifically recognized and accepted the *Jensen* line of demarcation between state and federal jurisdiction,[21] and found that the claimant's employment at the time of his accident was maritime, the same as in *Nogueira*.[22]

In holding the Act applicable to employers that had any employees engaged in maritime employment, the Court was interpreting the exclusive remedy provisions of Section 905 and not the coverage provisions of Section 903(a) for the

[21] "The 'Jensen line of demarcation between state and federal jurisdiction' has been accepted." 344 U.S. 337.

[22] "* * * Whether the injury occurred to an employee loading freight into cars on the float, as in the Nogueira case, or to one like respondent moving loaded cars from a float could make no difference. Both employments are maritime. * * *" 344 U.S. 339-340.

Court had already held the injury was within Section 903(a) when the opinion stated:

> "New Jersey could not have enacted statutes granting compensation for respondent's injury on navigable water, therefore respondent comes within the coverage of that portion of Section 903(a) that includes those outside the reach of state compensation laws." 344 U.S. 337.

The next decision of this Court was a per curiam decision in *Avondale Marine Ways* v. *Henderson*, 346 U.S. 366 (1953). In the *Avondale* case, the Fifth Circuit (201 F. 2d 437) had before it an attempt to set aside an award under the Longshoremen's Act. At the time of the accident, the employee was cleaning a tank of a barge[23] that had been drawn up on a marine railway. There was no contention that the work the employee was doing was not maritime; the only contention was that a marine railway (on which the vessel is drawn out of the water) was not "any dry dock" as provided in Section 903(a) of the Longshoremen's Act.[24] The Fifth Circuit allowed recovery under the Longshoremen's Act and this Court affirmed that decision in a per curiam opinion citing *Davis*, *Baskin* and *Moores*. The concurring opinions by Mr. Justice Burton and Mr. Justice Douglas simply recognize the soundness of the holding below that a marine railway is "any dry dock" within the meaning of the Act. The affirmance by the majority of this Court in

[23] 346 U.S. at page 366:

> "• • • • in that the decedent, at the time of receiving his fatal injury, was engaged in cleaning a tank of a barge • • • "

[24] *Avondale Marine Ways, Inc.* v. *Henderson*, 201 F. 2d 437, at page 438:

> "• • • In short, its position was that the language, 'navigable waters of the United States, including any dry dock,' as those words are used in Section 3(a) of the Act, 33 U.S.C.A. §903(a) does not extend to and include the marine railway."

a per curiam opinion, citing *Davis*, *Moores* and *Baskin* recognizes that *Davis* is authority for applying the twilight zone theory to the locale of the accident as well as to the maritime character of the work.

In connection with *Avondale*, it is noted that there was no pre-1927 decision holding that work on a dry dock was within the realm of the local concern doctrine, but to the contrary *Gonsalves* v. *Morse Dry Dock & Repair Co.*, 266 U.S. 171 (1924) held that work on a floating dry dock was exclusively maritime, relying upon *The R. W. Parsons*, 191 U.S. 17, 33; and *The Jefferson*, 215 U.S. 130 (1909). In *The Jefferson* it was said:

> "It was long ago recognized by this Court that a service rendered in making repairs to a ship or vessel, whether in or out of the water, was a maritime service. Peyroux v. Howard, 7 Pet. 324, 8 L. Ed. 700."

Thus the decisions in the majority per curiam opinion, and the concurring opinions, were supported by the pre-1927 decisions.

The last pronouncement interpreting Section 903(a) is found in *Hahn* v. *Rock Island Sand & Gravel Company*, 358 U.S. 272 (1959). In the *Hahn* case, the Court permitted recovery under the common law of the State of Oregon on the basis that the employee's injury occurred within the twilight zone and he could elect to recover under the workmen's compensation law of the state and since the employer had no workmen's compensation under the state act, he could maintain a negligence action, but again in that decision, the Court recognized the limitations of coverage under the Longshoremen's and Harbor Workers' Act:

> "By its terms, the Longshoremen's and Harbor Workers' Compensation Act does not apply 'if recovery for the disability or death through workmen's compensation proceedings *may* • • • *validly be provided by State*

Law." (3, 44 Stat. 1426, 33 U.S.C. 903(a), 33 U.S.C.A. 903(a), emphasis supplied) * * *"

D. The Post-1927 Decisions of this Court Place New Ship Construction Outside of the Scope of the Longshoremen's and Harbor Workers' Compensation Act.

The foregoing post-1927 legal history shows that the intent of Congress in Section 903(a) has been repeatedly construed to be to exclude injuries occurring upon navigable waters where recovery for the disability or death through workmen's compensation proceedings may be validly compensated by state laws. The opinions in *Nogueira*, *Crowell* v. *Benson*, *Parker* v. *Motor Boat*, *Davis*, *O'Rourke* and *Hahn* specifically state that the coverage provisions of Section 903(a) includes only cases where recovery through workmen's compensation proceedings cannot validly be provided by state law. The per curiam opinions in the remaining cases of *Moores*, *Baskin* and *Arendale* contain no discussion. It follows that the decisions of this Court since 1927 have recognized that state workmen's compensation applies to new construction as in *Great South-Porter Ship Co.* v. *Rohde*, and that the state remedy is exclusive, as in *Millers' Indemnity Underwriters* v. *Braud*, the same as if these decisions had been written into Section 903(a). The fact that the Court has expanded the pre-1927 state coverage in the twilight zone cases of *Davis*, *Moores*, and *Baskin*, has no effect on the present case. In those decisions, the Court has found no constitutional obstacle in applying the state law.[3] This was the view of the respectable minority in the pre-1927 five to four decisions of *Jensen* and *Knickerbocker*. The view of *Davis*, *Moores* and *Baskin* is the same as the view Congress had

[3] *Davis* said: "* * * we hold that the Constitution is no obstacle to the petitioners' recovery." 317 U.S. 258.

in the passage of the Act of October 6, 1917 wherein Congress attempted to "overrule" *Jensen* and make state compensation applicable to all cases. Likewise, the view of *Davis, Moores* and *Baskin* is the same as the view of Congress in the Act of June 10, 1922 when Congress attempted to "overrule" *Knickerbocker* and not only make state compensation applicable to all cases, but provide that the state remedy was exclusive.

The Court created the "twilight zone" in *Davis* apparently because the Court recognized that the problem of allowing state compensation in cases where there are no specific pre-1927 holdings allowing state coverage involves the meeting or avoiding the constitutional principles announced by *Jensen*.

In the instant case before the Court there is no such problem for two reasons. The first reason is that the unanimous decision of this Court in *Grant Smith-Porter Ship Co.* v. *Rohde* has taken new construction out of the *Jensen* line of decisions and *Millers' Indemnity Underwriters* v. *Braud* has made the state remedy exclusive. In the second place, the question of whether the Longshoremen's and Harbor Workers' Act is applicable involves no question of constitutional objection, but only a matter of the construction of Section 903(a). The question here present is not whether Congress could but whether Congress did.

Respondents respectfully submit that the pre-1927 legal history, including *Grant Smith-Porter Ship Company*, leaves no doubt but that it was the clear intent of Congress to exclude new ship construction from the Longshoremen's and Harbor Workers' Act and to leave new ship construction under the state acts. Further, it is respectfully submitted that every decision of this Court since 1927 has so construed the coverage provisions of Section 903(a).

If we should adopt the theory of coverage contended for by Petitioners, that *O'Rourke* took away the requirement of a maritime service at the time of the accident and that *Avondale* took away the requirement that the accident occur upon navigable waters, then what accident is not under the Longshoremen's and Harbor Workers' Act? The dilemma and litigation that would face employers and their carriers under such a holding would be endless, particularly in view of the holding in *Hahn*.

E. The Decisions of the Courts of Appeals Hold That New Ship Construction Is Not Within the Coverage of the Longshoremen's and Harbor Workers' Compensation Act.

Petitioners contend that decisions of other Courts of Appeals have allowed awards under the Longshoremen's and Harbor Workers' Act under circumstances inconsistent with the decision below of the Court of Appeals for the Fifth Circuit. None of the cases cited by Petitioners except *U. S. Casualty Company* v. *Taylor*[26] involved injuries under circumstnces which pre-1927 decisions of this Court had previously held to be under the coverage of state workmen's compensation acts. For instance, *The Travelers Insurance Company* v. *McManigal* (4 Cir., 139 F. 2d 949) involved an injury occurring while the employee was working on the construction of a dry dock from which the water had been pumped out at the time of the accident. In *Newport News Shipbuilding & Dry Dock Co.* v. *O'Hearne* (4 Cir., 192 F. 2d 268), the injury was received while repairing a dry dock that was in another dry dock for repairs. *Morrison-Knudsen Co.* v. *O'Leary* (9 Cir., 288 F. 2d 542, cert. denied, 368 U.S. 817) involved the drowning of a worker who was using a boat on the waters of a tunnel which tunnel had been used to divert the waters of a navigable stream. In *Dixie Sand & Gravel Corp.* v. *Holland*, (6 Cir., 255 F. 2d 304) the employee

[26] 64 F. 2d 521, certiorari denied, 290 U.S. 639

at the time of the injury was working with and acting as a night watchman making the rounds of the employer's barges when he fell between the barges into the river and drowned. In *DeBardeleben Coal Corp.* v. *Henderson* (5 Cir., 142 F. 2d 481) the deceased was employed by a barge transport company to keep up the floating equipment including painting and repairing the barges and he fell off a barge into the Mississippi River.

To the contrary, *U. S. Casualty Company* v. *Taylor* involved a case exactly like the present case before this Court. In that case the employee was engaged in performing services in the completion of a new ship launched but not quite finished or placed in navigation, and the Fourth Circuit Court reversed an award under the Longshoremen's and Harbor Workers' Act because the injury was received under circumstances where workmen's compensation may be validly provided by state law and held that the limitation imposed by Section 903(a) barred an award by the Deputy Commissioner.[27]

Petitioner contends that in *The Travelers Insurance Co.* v. *McManigal*, 139 F. 2d 949 the Fourth Circuit refused to follow its decision in *U. S. Casualty Company* v. *Taylor*,

[27] We conclude from these pronouncements of the Supreme Court that the federal act is applicable only to workmen engaged in maritime employment, and that compensation under the act may lawfully be paid only in those cases in which a state has no authority to act. The phrase 'may not validly be provided by State law' obviously refers to the authority of a state to act and not to the inquiry as to whether a state has exercised its power. Congress intended to occupy only a portion of the field (the crews of ships being excepted) from which the states are excluded, and to abstain altogether from duplicating the work of the states in the field which they are permitted to enter. * * *" 64 F. 2d 524.

* * *

"It follows that the deputy commissioner was barred from awarding compensation in this case by the limitation imposed by section 903(a) of the act." 64 F. 2d 525.

but this is not so, for the decision specifically recognized the maritime distinction between building a new ship and repairing a completed vessel[28] but held this distinction was not analagous to the construction of a dry dock.[29] The decision in *McManigal* clearly recognized that an injury may be excluded by that portion of Section 903(a) of the Act wherein it is provided "* * * but only * * * if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law * * *" but held that such provision was not applicable to the facts of the case.[30]

Petitioner further contends that the *Taylor* decision was further rejected by the Fourth Circuit in *Newport News Shipbuilding & Dry Dock Co.* v. *O'Hearne*. It is to be noted that the *O'Hearne* case involved an injury received while repairing a dry dock that was in another dry dock for repairs. This was just as much a maritime service as the repair of a vessel. Rather than rejecting the *Taylor* decision, the *O'Hearne* decision again recognized the cov-

[28] The Opinion states at 139 F. 2d 950: "* * * An analogy is drawn with the historic distinction which the courts have made between work performed in the building of a ship which is not considered maritime and work upon a completed ship which partakes of this character. See *Frankel* v. *Bethlehem-Fairfield Ship Yard*, 4 Cir., 132 F. 2d 634; *United States Casualty Co.* v. *Taylor*, 4 Cir., 64 F. 2d 521."

[29] 139 F. 249 at page 952: "It is not material that in the pending case the dry dock was not finished. Not only was the locality within the maritime jurisdiction, but the work was maritime in its nature. We do not think that a distinction should be drawn in this respect between an unfinished and a finished structure in analogy to the distinction between a completed ship and one in the course of construction. * * *"

[30] The Court said in 193 F. 2d 949, at pages 952-953: This discussion disposes of the argument that the whole matter was one of local concern within the jurisdiction of the State Commission and therefore excluded from the jurisdiction of the federal commission by the exception in §3 of the Act. * * *"

erage limitation contained in Section 903(a) of the Act and said:

> "* * * we hold that the case falls within the purview of the Federal statute and *outside the permissible scope of the state enactment.*" (emphasis ours) 192 F. 2d 968, 971.

CONCLUSION

For the foregoing reasons Respondents, The Travelers Insurance Company and Levingston Shipbuilding Company, respectfully submit that the judgment of the Court of Appeals below reversing the District Court and setting aside the Compensation Order of May 13, 1960 be in all things affirmed.

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October Term, 1941

[redacted]

INDEX

Cases:

	Page
Kibadeaux v. *Standard Dredging Co.*, 81 F. 2d 670	2
Massachusetts Bonding & Insurance Co. v. *Lawson*, 149 F. 2d 853	2
Newport News Shipbuilding & Dry Dock Co. v. *O'Hearne*, 192 F. 2d 968	2–3
O'Leary v. *Brown-Pacific-Maxon*, 340 U.S. 504	4
Pacific Employers Insurance Co. v. *Pillsbury*, 130 F. 2d 21	2
Teichman v. *Loffland Brothers Company*, 294 F. 2d 175, certiorari denied, 268 U.S. 948	2
Western Boat Building Co. v. *O'Leary*, 198 F. 2d 409	2–3
Wilkes v. *Mississippi River Sand & Gravel Co.*, 202 F. 2d 383	2

Statutes:

Longshoremen's & Harbor Workers' Act:	
33 U.S.C. (Supp. III), 906(b) Pub. L. 87–87, approved July 14, 1961, 75 Stat. 203	3
33 U.S.C. 913	3

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 532

C. D. CALBECK, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

THE TRAVELERS INSURANCE CO. AND LEVINGSTON SHIPBUILDING CO.

P. J. DONOVAN, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

AVONDALE SHIPYARDS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

This reply brief is being filed in order to answer a new argument raised in this Court for the first time by respondent Avondale in its brief on the merits.

Avondale now contends that the employee's acceptance of checks which indicated that they represented payments under the Louisiana Workmen's Com-

pensation Act precludes recovery under the Longshoremen's Act (Respondent Avondale's Brief, pp. 25–26).[1] Avondale apparently contends that the acceptance of these checks constituted an election by the employee of his remedy under State law, thus precluding recovery under the Longshoremen's Act even if the injury is covered thereunder (Avondale's Brief, pp. 25–26).

The short answer to this contention is that the courts have uniformly held that an employee's acceptance of voluntary payments under a State act does not preclude recovery under the Longshoremen's Act. *Massachusetts Bonding & Insurance Co. v. Lawson*, 149 F. 2d 853 (C.A. 5); *Newport News Shipbuilding & Dry Dock Co. v. O'Hearne*, 192 F. 2d 968 (C.A. 4); *Western Boat Building Co. v. O'Leary*, 198 F. 2d 109 (C.A. 9). Accord: *Pacific Employers Insurance Co. v. Pillsbury*, 130 F. 2d 21 (C.A. 9), and *Kliebenstein v. Standard Dredging Co.*, 81 F. 2d 670 (C.A. 5) (Jones Act suits not barred by claim under State compensation act). See also, *Teichman v. Lofland Brothers Company*, 294 F. 2d 175 (C.A. 5), certiorari denied, 368 U.S. 948; *Wilkes v. Mississippi River Sand & Gravel Co.*, 202 F. 2d 383 (C.A. 6). Indeed, the courts have held that even an award and order to pay compensation under a State act does not preclude a claim under the Longshoremen's Act. *Newport News Shipbuilding & Dry*

[1] Respondents Travelers Insurance Company and Levingston Shipbuilding Company make no such contention, although the claimants in that case apparently received a small sum of money under the Texas Workmen's Compensation Act (R. 12).

Dock Co. v. *O'Hearne, supra; Western Boat Building Co.* v. *O'Leary, supra.*

It is also important to note that the Deputy Commissioner did allow Avondale to set off the payments made under the State act against those due under the Longshoremen's Act (R. 93–94). Accordingly, Avondale was in no way prejudiced by the employee's failure to file his claim with the Deputy Commissioner prior to November 1958.[2] It merely seeks to take advantage of the fact that the State of Louisiana limits the maximum workmen's compensation payments to $35 a week, with a $14,000 total, in contrast to the more liberal provisions of the Longshoremen's Act, which in this case provide benefits which are 9.6 times the amount receivable under the State act (see our main brief, pp. 10–11).[3] Avondale has offered no other reason for this Court to adopt a rule which would bar an employee's claim because of the form in which an employer made compensation payments concededly due him.[4]

---

[2] Avondale has never contended that the claim was barred by the Act's one year period of limitations. 33 U.S.C. 913; R. 68–69, 78–79.

[3] The Longshoremen's Act has no limitation on total recovery. The $54 a week maximum has, since the injury here, been raised to $70. Pub. L. 87–87, approved July 14, 1961, 75 Stat. 203; 33 U.S.C. (Supp. III) 906(b).

[4] Avondale does suggest that upholding the award here would be giving an employee "two bites at the cherry" (Avondale's Brief, p. 26). But this case does not involve an employee who has lost on the merits before a State agency and then seeks compensation for the same injury under the Longshoremen's Act. The employee here never had his claim adjudicated by any State official and never filed any claim for State compensation.

At any rate, the facts in this case do not establish an "election" by the employee to obtain compensation under the State act. Minus Aizen made no claim, filed no suit for benefits under State law, and took no affirmative steps to "elegt" a remedy under State law. He merely accepted the checks sent him by his employer, which were due him regardless of whether he was covered by the State act or by the Longshoremen's Act. In fact, the benefits paid to him by Avondale were considerably in excess of those due under the State act and were approximately those due under the Longshoremen's Act.[3] In these circumstances, it is clear that the employee cannot be said to have made a binding election to seek recovery solely under State law. And the Deputy Commissioner was plainly justified in refusing to find such an election. *O'Leary* v. *Brown-Pacific-Maxon*, 340 U.S. 504.

[3] In addition to the $35 a week due under the State act, Avondale paid claimant $3830 marked "advance on compensation", so that the total payments were approximately those due under the Longshoremen's Act (R. 89–90, 93). Similarly, Avondale furnished medical and surgical treatment, at an expense of $7000, although the maximum payable under State law was $2500 (Avondale's Brief, p. 4).

CONCLUSION

For the foregoing reasons, and those set forth in our main brief, the judgments of the court of appeals should be reversed and the judgments of the district courts reinstated.

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APRIL 1962.